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COURT OF CRIMINAL APPEALS
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IN THE

COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
10/4/2021
DEANA WILLIAMSON, CLERK

IN RE THE STATE OF TEXAS EX REL. BRIAN W. WICE, RELATOR.

ON STATE'S PETITION FOR WRIT OF MANDAMUS
AGAINST THE FIRST COURT OF APPEALS

ANCILLARY TO CAUSE NOS. 1555100, 1555101, 1555102
IN THE 185TH CRIMINAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

STATE'S PETITION FOR WRIT OF MANDAMUS

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THE STATE OF TEXAS

ORAL ARGUMENT REQUESTED

IDENTIFICATION OF THE PARTIES

Pursuant to Tex. R. App. P. 53.2 (a), the identities of all interested parties are provided so the justices may determine if they are disqualified to serve or should recuse themselves from participating in this proceeding:

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Respondent:
Court of Appeals First Judicial District at Houston

Real Party in Interest-Criminal Defendant:
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TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES

PAGE

CASES:

CODE OF CRIMINAL PROCEDURE:

RULES OF APPELLATE PROCEDURE:

GOVERNMENT CODE:

TEXAS CONSTITUTION:

MISCELLANEOUS:

STATEMENT REGARDING ORAL ARGUMENT

This original proceeding tests the bedrock principle that the Texas Constitution reigns supreme and trumps any statute. It also affords this Court the opportunity to reaffirm its long-standing rule that a party's insistence on sandbagging the judges who could have cured a procedural defect that unnecessarily added years of litigation to this prosecution must *pay* for and not be *rewarded* for their gamesmanship.

The procedural posture of this original matter, the unique issues it presents, and the facts that animate them are suited to, and deserving of, oral argument. Oral argument would significantly assist this Court in its determination of whether a divided court of appeals abused its discretion in holding that: (1) the plain text of a constitutional mandate must yield to a plebeian statute; (2) a general appointment order trumps a specific order; and (3) a defendant is given free rein to sandbag trial and appellate judges with impunity in the face of basic principles of procedural default and the law of the case doctrine.[1]

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[1] *See* Tex. R. App. P. 39.1 (party who requests oral argument may argue the case "unless the court ... decides ... the decisional process would not be significantly aided by oral argument").

STATEMENT OF THE CASE

This original mandamus proceeding is brought by Relator, Brian W. Wice, Collin County Criminal District Attorney Pro Tem on behalf of the State of Texas ["State"]. The State seeks to compel Respondent, the First Court of Appeals at Houston ["court of appeals"], to vacate its May 27, 2021, published majority opinion returning venue to Collin County in the underlying felony prosecutions of Real Party in Interest, Warren Kenneth Paxton, Jr. ["Paxton"].[2]

STATEMENT OF JURISDICTION

This Court has original jurisdiction to issue a writ of mandamus against Respondent pursuant to constitutional and statutory jurisdiction.[3]

STATEMENT OF THE PROCEDURAL HISTORY

1. Introduction: The Long and Winding Road

Over six years ago, a Collin County grand jury indicted Paxton for the first-degree felony of securities fraud and the third-degree felony of

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[2] Tab 1. *In re State of Texas ex rel Brian W. Wice*, ___ S.W.3d ___, 2021 WL 2149332 (Tex.App.–Houston [1st Dist.] May 27, 2021, orig. proc.)(not yet reported)(divided court of appeals denying the State's petition for mandamus and returning venue to Collin County)("*In re Wice*").

[3] Tex. Const. art. V, sec. 5(c); Tex. Code Crim. Proc. art. 4.04, sec. 1; *In re State ex rel. Mau v. Third Court of Appeals*, 560 S.W.3d 640, 644 (Tex.Crim.App. 2018)(Court of Criminal Appeals vested with original jurisdiction to issue writs of mandamus against court of appeals).

acting as an investment advisor with the State Securities Board.[4] To avoid prosecution, Paxton crafted a tripartite game plan:

- Removing Judge George Gallagher as presiding judge.[5]
- Derailing these prosecutions by defunding the special prosecutors.[6]
- Returning venue to Collin County.[7]

When a majority of the court of appeals denied the State's request for reconsideration en banc over the dissent of two justices,[8] it appeared as if Paxton had run the table. But the procedural history of this case, the

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[4] *Ex parte Paxton*, 493 S.W.3d 292, 296-97 (Tex.App.– Dallas 2016, pet. ref'd)(en banc) (affirming the trial court's orders denying relief in Paxton's pre-trial writs challenging the State's ability to prosecute him for these three felonies).

[5] Tab 2. *In re Paxton*, 2017 WL 2334242 (Tex.App.– Dallas May 30, 2017)(not designated for publication)(removing Judge Gallagher because Paxton did not consent to him presiding as required by Tex. Code Crim. Proc. art. 31.09, after granting State's motion for change of venue).

[6] *Wice v. Fifth Court of Appeals*, 581 S.W.3d 189, 200 (Tex.Crim.App. 2018)(vacating second interim payment order to the State because the $300 hourly fee it was promised by former Collin County District Judge Scott Becker upon their appointment exceeded his authority under the 2015 Collin County fee schedule). While the Collin County Commissioners did the heavy lifting in defunding the underlying prosecutions, it was Paxton who first challenged the State's hourly fee in a motion he filed on December 29, 2015. Tab 32. Although continuing to work on the most labor-intensive tasks before three different trial courts, two courts of appeals, and this Court, the State has not been paid for its vast body of work in these proceedings since January 2016.

[7] *In re Wice*, 2021 WL 2149332 at *8 (divided court of appeals denying the State's petition for writ of mandamus and returning venue to Collin County). All references to the court of appeals' published opinion issued by the panel refer to the majority unless otherwise noted.

[8] Tab 3. *In re Wice*, ___ S.W.3d ___, 2021 WL 4095254 (Tex.App.– Houston [1st Dist.] Sept. 9, 2021)(en banc)(not yet reported). Justice Guerra dissented from the denial of en banc reconsideration. Justice Goodman dissented from the denial of en banc reconsideration for the reasons in his concurring and dissenting opinion. Justice Farris did not participate.

long and winding road that leads to this Court's door, reveals that because Paxton's most recent victory is foreclosed by "clearly controlling legal principles" from this Court, the State has demonstrated "a clear right to the [mandamus] relief sought."[9]

2. Paxton's Challenge to Judge Gallagher's Venue Ruling: Act I

In July 2015, Tarrant County District Judge George Gallagher was assigned to preside over these cases by Judge David Evans, the Presiding Judge of the Eighth Administrative Region, at the request of Judge Mary Murphy, the Presiding Judge of the First Administrative Region.[10] In February 2017, the State filed a motion to change venue from Collin County. Following an evidentiary hearing, Judge Gallagher granted the State's motion on March 30, 2017, and issued a supplemental order on April 11, 2017 changing venue to Harris County.[11] On May 10, 2017, Paxton claimed this order was void because Judge Gallagher's assignment ended on January 2, 2017.[12] Before a scheduled hearing to be held in

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[9] *Wice v. Fifth Court of Appeals*, 581 S.W.3d at 194.

[10] *In re Wice*, 2021 WL 2149332 at *2.

[11] *Id.*

[12] *Id.*

Harris County, Paxton sought mandamus relief in the Fifth Court of Appeals on May 15, 2017[13] claiming that Judge Gallagher continued to preside over these cases without the consent of Paxton and his counsel.[14] But Paxton *did not* seek to vacate Judge Gallagher's venue order on the grounds his appointment purportedly ended in January 2017.[15] On May 30, 2017, the court of appeals granted Paxton relief and removed Judge Gallagher from presiding.[16] These cases were then randomly assigned to Judge Robert Johnson, Presiding Judge of the 177th District Court of Harris County on June 13, 2017.[17]

3. Collin County Convinces the Fifth Court of Appeals and a Majority of This Court to Vacate the State's Hourly Pay Rate

It was not until three years later that Judge Johnson finally ruled on Paxton's challenge to Judge Gallagher's authority. The week before he acquired jurisdiction, Collin County Commissioners Court sought mandamus relief in the Fifth Court of Appeals against Judge Gallagher,

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[13] *In re Paxton*, 2017 WL 2334242 at *2.

[14] *See* Tex. Code Crim. Proc. art. 31.09.

[15] *In re Paxton*, 2017 WL 2334242 at **1-5.

[16] *Id.* at *5.

[17] *In re Wice*, 2021 WL 2149332 at *2.

arguing he lacked authority to pay the State the hourly rate the Local Administrative Judge of Collin County agreed to pay it.[18] In August 2017, the court of appeals granted the Commissioners mandamus relief.[19]

On September 19, the State filed a petition for writ of mandamus in this Court to vacate the court of appeals' decision and reinstate Judge Gallagher's second interim payment.[20] After granting a stay, this Court filed and set this proceeding "to determine who got it right: the trial court or the court of appeals."[21] On November 21, 2018, by a vote of 6-3,[22] a majority of this Court concluded that the court of appeals – not the trial court – "got it right":

> Here, the trial court exceeded its authority by issuing an order for payment of fees that is not in accordance with an approved fee schedule containing reasonable fixed rates or minimum and maximum hourly rates. We, therefore, agree with the court of appeals that the Commissioners Court of Collin County is entitled to mandamus relief. *We vacate the trial*

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[18] *Wice v. Fifth Court of Appeals*, 581 S.W.3d at 191-92.

[19] *In re Collin Cty.*, 528 S.W.3d 807, 810 (Tex.App.– Dallas 2017, orig. proc.).

[20] *Wice v. Fifth Court of Appeals*, 581 S.W.3d at 191-92.

[21] *Id.* (footnotes omitted).

[22] Judge Newell's majority opinion was joined by Presiding Judge Keller and Judges Keasler, Hervey, and Richardson. Judge Richardson filed a concurring opinion, Judge Yeary filed a concurring and dissenting opinion. Judges Alcala, Keel, and Walker filed dissenting opinions.

court's second order for interim payment and order the trial court to issue a new order of payment of fees in accordance with a fee schedule that complies with Article 26.05(c) of the Texas Code of Criminal Procedure.[23]

On June 19, 2019, this Court denied rehearing.[24] That same day, it issued its mandate reinvesting Judge Johnson with plenary jurisdiction in the underlying criminal prosecutions.[25]

4. Judge Johnson Consistently Refuses to Honor this Court's Mandate

Upon receipt of this Court's decision and mandate, Judge Johnson "acquired jurisdiction of the case only to see that the judgment of this Court was carried out."[26] As the court of last resort in Texas for criminal cases, "no other court of this state has authority to overrule or circumvent

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[23] *Id.* at 200 (footnote omitted)(emphasis added). In a concurring opinion, Judge Richardson sought to forestall Commissioners Court from attempting to claw back the funds the State had been paid for its work. *Id.* at 203-04 (Richardson, J., *concurring*)(because "the first payment by the Commissioners Court was a clear ratification of the agreement to pay [the $300 an hour] requested for work already incurred, the Commissioners Court should not be entitled to recoup the fees already paid."). Nevertheless, in November 2019, Commissioners Court renewed an earlier threats to claw back the funds it paid to the State for its professional services in 2015, sending it a demand letter in which it threatened to take legal action unless the State promptly returned these fees. Tab 7. Counsel retained by the State informed Commissioners Court in no uncertain terms that it would not do so. Tab 8. Like all schoolyard bullies who are challenged, Commissioners Court folded its tents and silently stole away.

[24] *Wice v. Fifth Court of Appeals*, 581 S.W.3d at 189.

[25] Tab 18.

[26] *Berry v. Hughes*, 710 S.W.2d 600, 601 (Tex.Crim.App. 1986)(per curiam).

[this Court's] decisions or disobey its mandates."[27] Yet in the almost three years since this Court ordered Judge Johnson to issue a new order of payment of fees to the State, he has never carried out the mandate of this Court, despite the State's repeated requests for him to do so.[28]

One month after Judge Johnson reacquired plenary jurisdiction, the State filed a motion asking Judge Johnson to comply with his ministerial duty to carry out this Court's mandate "to issue a new order of payment of fees in accordance with a fee schedule that complies with Article 26.05(c) of the Texas Code of Criminal Procedure."[29] Although this motion remained pending for almost a year, Judge Johnson refused to comply with this Court's mandate[30] within a reasonable amount of time.[31] While

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[27] *State ex rel. Vance v. Hatten*, 508 S.W.2d 625, 627 (Tex.Crim.App. 1974)(per curiam).

[28] The State argued without contradiction that it had repeatedly asked Judge Johnson to rule on these motions but that he had consistently refused to do so. Tab 9 at 4-5. *See e.g., Pitts v. State*, 916 S.W.2d 507, 510 (Tex.Crim.App.1996)("This Court accepts as true factual assertions made by counsel which are not disputed by opposing counsel.").

[29] Tab 10 ("Motion for Ex parte Determination Regarding Issuance of a New Order for Payment."). The State pointed out that a determination of attorneys fees is an exception to State Bar Disciplinary Rules prohibiting ex parte communications between a party and the trial court. *See Morrison v. State*, 575 S.W.3d 1, 17 (Tex.App.–Texarkana 2018, no pet.).

[30] Judge Johnson also repeatedly refused to honor his ministerial duty to rule on Nicole DeBorde's *unopposed* motion to withdraw as attorney pro tem she filed on June 25, 2019. Tab 11.

[31] *See In re Ramos*, 598 S.W.3d 472, 473 (Tex.App.–Houston [14th Dist.] 2020, orig. proc.) (trial court has ministerial duty to rule on motions after filing within a reasonable time upon request).

the State argued that this refusal to rule on motions pending for over a year was an abuse of discretion warranting mandamus relief,[32] the court of appeals declined to reach this issue.[33]

5. Paxton's Challenge to Judge Gallagher's Venue Ruling: Act II

In July 2019, Paxton filed a motion asking Judge Johnson to vacate Judge Gallagher's venue order as void and return venue in the underlying cases to Collin County.[34] In December 2019, Judge Johnson held the *only* on-the-record hearing in the year since he reacquired jurisdiction, limiting arguments to Paxton's challenge to the venue order.[35] On June 26, 2020, Judge Johnson granted Paxton's motion to vacate Judge Gallagher's void venue order, returning venue to Collin County.[36]

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[32] *See e.g., In re Mesa Petroleum Partners, LP*, 538 S.W.3d 153, 158 (Tex.App.– El Paso 2017, orig. proc.)(trial court abused its discretion refusing to rule on a motion that was pending for eight months even where the matter presented "complicated issues, a lengthy trial record, and over 1,000 pages of post-verdict briefing").

[33] *State ex rel Wice,* 2021 WL 2149332 at *8 n. 13 ("Because of our disposition of the State's first issue, we do not reach its second and third issues requesting that we compel the trial court to rule on certain motions. See TEX. R. APP. P. 47.1").

[34] *In re Wice,* 2021 WL 2149332 at *2. Tab 25.

[35] Tab 12. Judge Johnson announced off the record prior to the hearing that he would only entertain arguments on Paxton's motion to "Set Aside Change of Venue as Void and Return Cases to Collin County, Texas."

[36] Tab 13.

6. A Divided Court of Appeals Denies Mandamus Relief, Sets Aside Judge Gallagher's Order, and Returns Venue to Collin County

In June 2020, the State filed a petition for writ of mandamus asking the court of appeals to vacate Judge Johnson's order and compel him to rule on the State's motion to obey this Court's mandate to issue a revised payment order.[37] After Judge Johnson voluntarily recused himself on July 6, 2020, the cases were reassigned to Judge Jason Luong, 185th District Court of Harris County.[38] The court of appeals abated this matter to allow Judge Luong to reconsider Judge Johnson's order and, if appropriate, consider the State's pending motions.[39] On October 23, 2020, Judge Luong granted Paxton's motion and ordered venue returned to Collin County.[40]

On May 27, 2021, the court of appeals denied the State's request for mandamus relief over Justice Goodman's dissent,[41] concluding that:

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[37] *In re Wice,* 2021 WL 2149332 at *2. The State also sought mandamus relief to compel Judge Johnson to rule on DeBorde's *unopposed* motion to withdraw as attorney pro tem. *See* n. 30, *supra*. The court of appeals granted the State's request for a stay. Tab 14.

[38] *In re Wice,* 2021 WL 2149332 at *3.

[39] Tab 15.

[40] Tab 16. Judge Luong's belief he lacked jurisdiction to reconsider Judge Johnson's ruling evinces a fundamental misapprehension of the court of appeals' stay order. *See In re Wice,* 2021 WL 2149332 at *4 n. 8.

[41] *Id.* at *8 (Goodman, J., *concurring and dissenting*). Justice Goodman's opinion is styled as a "Concurring and Dissenting Opinion." For ease, it will be referred to as a dissenting opinion.

- Paxton did not procedurally default this issue in July 2017 under the law of the case doctrine.[42]

- Paxton's objection was timely that Judge Gallagher's venue order was voidable because his appointment ended in January 2017.[43]

- The plain language in Article V, section 11 of the Texas Constitution permitting district judges to exchange benches when expedient was trumped by the Court Administration Act.[44]

7. The State's Motion for Reconsideration En Banc of the Panel's Decision is Denied Over the Dissent of Two Justices

On September 9, 2021, a majority of the court of appeals denied reconsideration en banc over the dissent of Justice Goodman and Justice Guerra.[45] Justice Guerra dissented because the majority's opinion:

- "[erroneously] employs the general-versus-specific canon of construction to resolve the perceived conflict [between the assignment orders as to the scope and duration of Judge Gallagher's assignment], even though that canon was not urged by the parties."[46]

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[42] *Id.* at *4.

[43] *Id.* at *5.

[44] *Id.* at *7. It also rejected the State's interpretation of the two assignment orders permitting Judge Gallagher to change venue "because it places them in direct conflict with each other..." *Id.*

[45] Tab 17. Justice Guerra dissented from the denial of en banc reconsideration. Justice Goodman dissented from the denial of en banc reconsideration for the reasons in his concurring and dissenting opinion. Justice Farris did not participate. In an amended order denying reconsideration en banc, the court of appeals lifted its temporary stay imposed on July 15, 2021. *Id.*

[46] *In re Wice*, 2021 WL 4095254 at *2 (Guerra, J., *dissenting from the denial of en banc reconsideration*).

- "errs by giving greater effect to the general December 21 assignment order while ignoring the plain language of the specific July 29 assignment order that gave Judge Gallagher authority to preside over the underlying cases 'until plenary power ... expired or [Judge Murphy] ... terminated the assignment in writing,' *neither of which happened before Judge Gallagher signed the change of venue order.*"[47]

- erroneously sees a conflict between the July 28 and 29 orders of assignment, compounding that error by using the general-versus-specific canon of construction that, if applicable, "would compel the opposite conclusion."[48]

On September 15, 2021, this Court granted the State's request for a 21-day stay pending disposition of this petition for writ of mandamus.[49]

GROUND FOR MANDAMUS RELIEF

The State has a clear and indisputable right to relief from the court of appeals' decision returning venue in the underlying cases to Collin County and denying the State's petition for writ of mandamus.

SUMMARY OF ENTITLEMENT TO RELIEF

The State is entitled to mandamus relief because the First Court of Appeals' opinion conflicts with well-settled, unequivocal, and clearly

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[47] *Id.* (emphasis added)(internal bracketing omitted).

[48] *Id.* at *3.

[49] Tab 21. *In re State of Texas ex rel. Brian W. Wice*, No. WR-93,089-01 (Tex.Crim.App. Sept. 15, 2021)(not designated for publication)(order).

controlling legal principles by affirming the trial court's ruling that Judge Gallagher lacked authority to grant the State's motion to change venue because his appointment order ended when he entered this ruling.

First, Justice Goodman's dissenting opinion demonstrates that the majority erroneously found that the Court Administration Act trumped the plain language in Article V, section 11 of the Texas Constitution authorizing Judge Gallagher to exchange benches and preside over another court "when expedient" without an appointment order or formal record entry. This Court has long held that constitutional mandates are superior to statutes and that the Constitution must prevail in the event of a conflict.

Second, as explained in Justice Guerra's opinion dissenting from the denial of en banc reconsideration, Judge Murphy's order assigning Judge Gallagher to preside over the underlying matters until his plenary power expired or Judge Murphy terminated his assignment in writing – neither of which occurred – was a specific order trumping Judge Evans' general assignment order. The majority's decision interpreting Judge Murphy's assignment order impermissibly elevated form over substance and failed to recognize the context within which the assignment order was entered.

Third, the majority clearly abused its discretion in concluding that Paxton's challenge to Judge Gallagher's venue ruling was timely and not barred by the law of the case doctrine. Because Paxton could have raised this issue in his mandamus petition in the court of appeals, but consciously opted not to, and failed to timely object and obtain a ruling when the basis for his objection became apparent in January 2017, his later challenge to Judge Gallagher's authority was procedurally defaulted.

ARGUMENT AND AUTHORITIES

1. The Standard of Review for Obtaining Mandamus Relief

Mandamus is an extraordinary remedy, available only in limited circumstances.[50] While the State seeks to overturn the court of appeals' decision, this Court *does not* undertake appellate review of this opinion:[51]

> When a relator asks this Court to issue a writ of mandamus to order a lower appellate court to rescind a mandamus order of its own, we measure the lower appellate court's exercise of its own mandamus authority under a "clear abuse of discretion" standard. In practice, however, we pay no particular deference to the court of appeals's judgment with respect to whether the relator has established the requisites for mandamus relief. ... *Thus, we determine whether the court of appeals abused its discretion essentially by undertaking a de novo application of*

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[50] *Smith v. Flack*, 728 S.W.2d 784, 792 (Tex.Crim.App. 1987).

[51] *State ex rel. Young v. Sixth Judicial District Court of Appeals*, 236 S.W.3d 207, 210-11

the two-pronged test applied by the court of appeals.[52]

This Court has concluded that "in practice it makes little difference whether we purport to review the court of appeals's mandamus ruling or the trial court's order [ ]. Either way, we review the appropriateness of the trial court's conduct."[53] Viewed against this backdrop, the State is entitled to set aside Judge Luong's order returning venue to Collin County if it can show that: (1) it has no adequate legal remedy at law to address the alleged harm, and (2) the act it seeks to compel is purely ministerial.[54] This Court has restated this standard to mean that the State is entitled to relief if it can demonstrate: (1) it has no adequate remedy at law, and (2) it has a clear and indisputable right to the relief sought.[55] Because Judge Luong's ruling does not fall within the scenarios vesting the State with the right to appeal, mandamus is the State's *only* remedy at law.[56]

The ministerial act requirement is satisfied where the State shows

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[52] *Id.* (quotation marks and footnotes omitted)(emphasis added).

[53] *Bowen v. Carnes*, 343 S.W.3d 805, 810 n. 6 (Tex.Crim.App. 2011).

[54] *In re McCann*, 422 S.W.3d 701, 704 (Tex.Crim.App. 2013).

[55] *Wice v. Fifth Court of Appeals*, 581 S.W.3d at 194.

[56] *Padieu v. Court of Appeals Fifth Judicial District*, 392 S.W.3d 115, 117 (Tex.Crim.App. 2013).

a "clear right to the relief sought," *i.e.*, "the merits of the relief sought are beyond dispute."[57] This showing exists where the facts and circumstances dictate one rational decision "under unequivocal, well-settled (*i.e.*, from extant statutory, constitutional, or case law sources), and clearly controlling legal principles."[58] Judge Luong's judicial discretion does not preclude mandamus relief "to compel [him] to rule a certain way" on an issue "clear and indisputable" such that its merits are "beyond dispute."[59] This Court can order Judge Luong to rule in a particular fashion if the law invoked is "definite, unambiguous, and unquestionably applies to the indisputable facts of the case."[60] A ministerial act can sometimes be found in a case of first impression "if a statute at issue is unambiguous"[61] or when "the combined weight of our precedents clearly establishes" the proposition of law on which relief is predicated."[62]

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[57] *Id.*

[58] *In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex.Crim.App. 2013).

[59] *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194, 198 n. 3 (Tex.Crim.App. 2003).

[60] *In re Allen*, 462 S.W.3d 47, 50 (Tex.Crim.App. 2015).

[61] *Wice v. Fifth Court of Appeals*, 581 S.W.3d at 194-95.

[62] *In re State ex rel. Ogg*, 618 S.W.3d 361, 363 (Tex.Crim.App. 2021).

2. The Plain Language of Article V, section 11 of the Texas Constitution Authorized Judge Gallagher to Exchange Benches and Preside Over the 416th District Court "When Expedient" Without a Formal Appointment Order or Record Entry of the Reasons for the Exchange

Even if Judge Gallagher's appointment lapsed, he was authorized to act under Article V, section 11 of the Texas Constitution,[63] which allows district judges to exchange benches when they deem it to be expedient, even without the need for a formal order or record entry.[64] "Although better practice would require one, the exchange may be accomplished without the necessity of a formal order or entry on the record of the reasons for such exchange"[65] and "there are no geographical restrictions on this provision."[66] The majority held that applying the plain text of this constitutional mandate would "create confusion about the scope of [statutory] assignment orders and undermine the effectiveness of the Court Administration Act."[67]

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[63] "And the District Judges may exchange districts, or hold court for each other when they may deem it expedient, and shall do so when required by law."

[64] *See e.g., Davila v. State*, 651 S.W.2d 797, 799 (Tex.Crim.App. 1983); *Floyd v. State*, 488 S.W.2d 830, 832 (Tex.Crim.App. 1972); *Isaac v. State*, 257 S.W.2d 436, 437 (Tex.Crim.App. 1953).

[65] *Floyd v. State*, 488 S.W.2d at 832.

[66] *Sanchez v. State*, 365 S.W.3d 681, 685 (Tex.Crim.App. 2012).

[67] *In re Wice*, 2021 WL 2149332 at *7 (citing Tex. Govt. Code, sect. 74.001(b)(4)).

Justice Goodman's dissent makes plain that the majority's ruling is a clear abuse of discretion: "*Our Constitution is supreme. If its provisions undermine a statute, it is the statute that must give way.*[68] Courts have repeatedly said so with respect to Article V, Section 11 in particular."[69] Justice Goodman's dissent cited numerous cases holding the constitutional edict authorizing district judges to exchange benches when expedient cannot be taken away, abridged, or contravened by statute."[70] Tellingly, Paxton embraced these "unequivocal, well-settled, and clearly controlling legal principles" in a pleading his office recently filed in this Court,[71] and

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[68] This Court's sister Tribunal has repeatedly reaffirmed this fundamental tenet. *See e.g., Draughn & Cohen v. Brown*, 651 S.W.2d 728, 730 (Tex. 1983)(per curiam)(statutory provision that provided for chief justice to draw lots to determine lengths of newly-elected court of appeals justices' terms was trumped by, and had to yield to, contrary constitutional mandate); *State ex rel. Angelini v. Hardberger*, 932 S.W.2d 489, 492-93 (Tex. 1996)(relying on *Draughn* to conclude that Election Code provision defining when a judicial vacancy is created had to give way to contrary constitutional edicts setting out when a justice's resignation becomes effective to create a judicial vacancy).

[69] *In re Wice*, at *12 (Goodman, J, *dissenting*)(emphasis added)

[70] *Moore v. Davis*, 32 S.W.2d 181, 182 (Tex.Comm.App. 1930)("the right of district judges to exchange districts and hold court for each other ... cannot be taken away by statute."); *Ferguson v. Chapman*, 94 S.W.2d 593, 599 (Tex.Civ.App.– Eastland 1936, writ dism'd)(same); *Reynolds v. City of Alice*, 150 S.W.2d 455, 459 (Tex.Civ.App.– El Paso 1940, no writ)("There is no room for construction here, the literal terms [of Article V, section 11] must be followed."); *Connellee v. Blanton*, 163 S.W. 404, 406 (Tex.Civ.App. – Fort Worth 1913, writ ref'd)("the authority of district judges to hold courts for each other when they deem it expedient is conferred by the Constitution, and it cannot be supposed that the Legislature, in enacting 1676 of the Statues, intended to contravene that provision of the Constitution.").

[71] *In re State of Texas*, No. WR-92,966-01 (Tex.Crim.App. Sept. 29, 2021)(order dismissing writ on joint motion of the parties) REPLY IN SUPPORT OF PETITION FOR MANDAMUS at 4. Tab 20.

his argument was built on the very legal basis the majority ignored here:

- "The Texas Constitution must take precedence over state statutes."[72]

- "When the proposed application of a statute would abridge rights enshrined in the Texas Constitution, the statute must yield."[73]

- "Because the Representatives' proposed application of the state habeas statute would run headlong into the House of Representatives' constitutional power to compel their attendance, 'the statute must yield' to the extent of a conflict."[74]

Justice Goodman rejected the majority's conclusion that the Court Administration Act trumped Article V, section 11 of the Constitution because Judge Gallagher was statutorily assigned and had not exchanged benches. He wrote:

- Article V, section 11's use of "expediency" permitting the exchange of district benches is "very broad" and means "convenient and practical"[75] and because Judge Murphy and Judge Evans deemed it expedient for Judge Gallagher to preside over these cases, this constitutional provision authorized Judge Gallagher to sit even after

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[72] Tab 20, *citing Salomon v. Lesay*, 369 S.W.3d 540, 557 (Tex.App.– Houston [1st Dist.] 2021, no pet.).

[73] *Id.* at 556-57 (citing *Weiner v. Wasson*, 900 S.W.2d 316, 318-19 (Tex. 2005)).

[74] Tab 20, *citing Salomon v. Lesay*, 369 S.W.3d at 557.

[75] *Id.* at *10 (Goodman, J., *dissenting*). Justice Goodman's reasoning is fortified by the tenet that "courts should not give an undefined statutory term a meaning out of harmony or inconsistent with other provisions, although it might be susceptible of such a construction if standing alone." *TxDOT v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002)(citing Tex. Govt. Code section 311.011(b)).

his appointment order lapsed.[76]

- The framers "necessarily weighed the trade-off between certainty and flexibility and struck the balance in favor of the latter by placing no limitations other than expediency on the provision."[77]

- *Roberts v. Ernst,*[78] relied upon by the majority to hold that Judge Gallagher's assignment could not be viewed as a constitutional exchange of benches, is clearly distinguishable because its facts were not merely "very different" but "remarkable."[79]

Because "the terms of [Article V, section 11] are clear,"[80] the majority clearly abused its discretion in holding that "automatically convert[ing]" Judge Gallagher's expired assignment into a constitutionally-permitted exchange of benches when expedient "would create confusion about the

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[76] *Id.* The majority did not discuss or distinguish *Permian Corp. v. Pickett*, 620 S.W.2d 878, 880-81 (Tex.App.– El Paso 1981, writ ref'd n.r.e.), relied on by Justice Goodman. Contrary to its holding, *Permian* holds that an assignment order showing the judges involved had deemed it expedient for the assigned judge to preside over a case as authorized by Article V, section 11 even though the order referenced neither the constitutional provision nor its expediency standard.

[77] *Id.* at *11.

[78] 668 S.W.2d 843, 844-45 (Tex.App. – Houston [1st Dist.] 1984, orig. proc.).

[79] *In re Wice*, 2021 WL 2149332 at *11 (Goodman, J,, *dissenting*)("*Roberts* stands for the commonsense proposition that an exchange of benches cannot exist or be implied from an expired assignment, when the facts definitely show that one judge is interfering with the rightful authority of another. This principle has no applicability here, given that Gallagher was the lone judge presiding over these cases when they were transferred to Harris County.").

[80] *Wice v. Fifth Court of Appeals*, 581 S.W.3d at 194. *See also Reynolds v. City of Alice*, 150 S.W.2d at 459 ("There is no room for construction here, the literal terms [of Article V, section 11] must be followed.").

scope of assignment orders and undermine the effectiveness of the Court Administration Act."[81] Justice Goodman's reasoning is buttressed by the cases upon which he relies that are not addressed by the majority:

- "Thus, it will be seen that the authority of the district judges to hold courts for each other when they deem it expedient is conferred by the Constitution, and it cannot be supposed that the Legislature, in enacting [this statute], intended to contravene that provision of the Constitution."[82]

- "[T]he right of district judges to exchange districts and hold court for each other is provided for by section 11 of article 5 of our State Constitution, and cannot be taken away by statute."[83]

- "There is no room for construction here, the literal terms [of Article V, section 11] must be followed."[84]

Paxton's claim that no exchange of benches was permissible absent a "meeting of the minds" between Judge Gallagher and another judge as there was no bench to exchange[85] is without merit. Paxton's disapproval

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[81] ("But given that neither the presiding administrative judges nor the district judge who ordinarily presides over the Collin County court objected to Judge Gallagher continuing to hear these cases, any ostensible conflict with the Court Administration Act is chimerical."). *In re Wice*, 2021 WL 2149332 at *11 (Goodman, J., *dissenting*).

[82] *Connellee v. Blanton*, 163 S.W. at 406.

[83] *Moore v. Davis*, 32 S.W.2d at 182.

[84] *Reynolds v. City of Alice*, 150 S.W.2d at 460.

[85] Tab 22 at 19-21.

of the result the plain text in Article V, section 11 yields cannot justify the majority's sacrifice of the Texas Constitution on the altar of the Court Administration Act.[86] Judge Chris Oldner, presiding judge in the 416th District Court of Collin County, voluntarily recused himself in these cases in July 2015.[87] On January 2, 2017, Judge Andrea Thompson succeeded Judge Oldner and began presiding in the 416th District Court.[88] Because she had not recused herself and because individual judges and not benches are subject to recusal, Judge Gallagher could have exchanged benches with her when expedient under the Constitution as Justice Goodman correctly held.[89] Paxton's "ghost bench" rejoinder does nothing to lessen the State's clear entitlement to mandamus relief.

This Court has consistently held that in construing a provision of the Texas Constitution, "[W]e are principally guided by the language of the

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[86] *Cf. Worsdale v. City of Killeen*, 578 S.W.3d 57, 81 (Tex. 2019)(Boyd., J., *concurring*) ("[W]e cannot ignore a statute's unambiguous text just because we think it produces a result that seems 'absurd' in light of what we think (but the statute never says) is the statute's 'purpose.'").

[87] *In re Wice*, 2021 WL 2149332 at *1.

[88] *Id.* at *2.

[89] *Id.* at *12 (Goodman, J., *concurring and dissenting*)("Gallagher's continued involvement in these cases after the expiration of his assignment was expedient and therefore authorized by our Constitution.").

provision itself as the best indicator of the framers who drafted it and the citizenry who adopted it."[90] This Court has also stressed that, "Those who are called on to construe the Constitution should not thwart the will of the people by construing it differently from its plain meaning."[91] Because the Texas Constitution reigns supreme and the Court Administration Act must yield to it, the State has shown that it has a clear right to relief.[92]

If Paxton reprises his contention the State failed to preserve this complaint, this too-bold-by-half riposte achieves no greater cachet with its mere repetition. His ill-considered argument that the State had to make the specific objection that the Court Administration Act was an "otherwise insignificant statute" that could never trump a constitutional mandate to preserve this complaint in an original proceeding is simply unsupported by any authority. All the State had to do to preserve this issue was to raise it when the trial judges were in a position to do something about it.[93] It did. That the State needed to anticipate the majority would rely on the

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[90] *Johnson v. Tenth Court of Appeals*, 280 S.W.3d 866, 872 (Tex.Crim.App. 2008).

[91] *Oakley v. State*, 830 S.W.2d 107, 109 (Tex.Crim.App. 1992).

[92] *See In re State ex rel. Weeks*, 391 S.W.3d at 122.

[93] *Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992).

Court Administration Act, even though Paxton's pleadings never cited it, is unsupported and insupportable. As this Court held in rejecting a similar claim, "*The context of appellant's arguments makes his position crystal clear.* ... He added more whistles and bells on appeal, but the tune was the same. ... It was not procedurally defaulted."[94] Neither was the State's.

3. Judge Murphy's Order Assigning Judge Gallagher to Preside Over the Underlying Matters Until His Plenary Power Expired or Judge Murphy Terminated his Assignment in Writing was a Specific Order that Trumped Judge Evans' General Assignment Order

The facts and procedural history that inform this Court's resolution of this issue are set out in Justice Guerra's dissenting opinion.[95]

The State argued that Judge Gallagher's July 29 appointment order "substantially mirrors" the one in *In re Richardson.*[96] *Richardson* rejected the claim that the face of the order revealed the visiting judge's authority to preside expired after one day, because doing so "would render [it] virtually nonsensical and incapable of the use for which it was intended,"[97]

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[94] *Clarke v. State*, 270 S.W.3d 573, 577 n. 3, 581 (Tex.Crim.App. 2008)(emphasis added).

[95] *In re Wice*, 2021 WL 4095254 at **1-2 (Guerra, J., *dissenting from the denial of en banc reconsideration*).

[96] 252 S.W.3d 822, 829-30 (Tex.App. – Texarkana 2008, orig. proc).

[97] *In re Richardson*, 252 S.W.3d at 830.

giving the trial judge "authority to hear the named case on the merits":

> [W]e are bound to read the assignment order as a whole and must keep in mind that form should not prevail over substance. To read the order as [relator] suggests, we would have to ignore the conditions of the assignment: "To hear Cause No. 99C985-202; *Southwest Construction Receivables, Ltd, et al v. Regions Bank.*" Since we must consider the order as a whole, we simply cannot ignore that language. ...
>
> *The most reasonable reading of the substance of this order within the context in which it was issued is that Judge Banner was assigned to hear this case when Judge Pesek recused himself. By reconciling the language in the order taken as a whole*[98] *and considering the context in which the order was issued*, we conclude that Judge Banner has authority, pursuant to Judge Ovard's assignment order, to hear the underlying cause on the merits.[99]

Consistent with *Richardson*, the State argued, "The most reasonable reading of the substance of [Judge Murphy's] order within the context in which it was issued is that [Judge Gallagher] was assigned to hear this case when [Judge Oldner] recused himself."[100] As in *Richardson*, where "the context in which the order was issued" was of paramount importance to its ruling that the order invested the visiting judge with authority, the

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[98] *See Wice v. Fifth Court of Appeals*, 581 S.W.3d at 197 (stressing that courts must review statutes with "logic and common sense" and "read [them] as a whole.").

[99] *In re Richardson*, 252 S.W.3d at 830-31 (citation omitted)(emphasis added).

[100] Tab 19.

State contended the context of Judge Murphy's July 29 order compelled the identical result.[101] Because Judge Luong impermissibly elevated form over substance in interpreting Judge Gallagher's appointment order, and failed to recognize the context[102] within which it was issued, his ruling was "contrary to clearly controlling legal principles."[103]

The majority rejected the State's interpretation of the assignment orders because "it places the orders in direct conflict with each other and renders the specific term of the assignment in [Judge Evans'] order meaningless, contrary to well-settled rules of construction."[104] But Justice Guerra exposed the fallacies in the majority's reasoning because it:

- "employs the general-versus-specific canon of construction to resolve the perceived conflict [between the assignment orders as to the scope and duration of Judge Gallagher's assignment], even though that canon was not urged by the parties."[105]
- "errs by giving greater effect to the general December 21 assignment

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[101] *Id.*

[102] *See Cadena Comercial v. Alcoholic Beverage*, 518 S.W.3d 318, 353 (Tex. 2017)(Willett, J., *dissenting*)(citations and footnotes omitted)("It is said that text without context is pretext.").

[103] *See Wice v. Fifth Court of Appeals*, 581 S.W.3d at 194.

[104] *In re Wice*, 2021 WL 2149332 at *7.

[105] *In re Wice*, 2021 WL 4095254 at *2 (Guerra, J., *dissenting from the denial of en banc reconsideration*).

order while ignoring the plain language of the specific July 29 assignment order that gave Judge Gallagher authority to preside over the underlying cases 'until plenary power ... expired or [Judge Murphy] ... terminated the assignment in writing,' *neither of which happened before Judge Gallagher signed the change of venue order.*"[106]

- erroneously perceives a conflict between the July 28 and 29 orders of assignment, compounding that error by using the general-versus-specific canon of construction that, if applicable, "would compel the opposite conclusion."[107]

Justice Guerra then explained why the majority's application of the "general-versus-specific" template constituted a clear abuse of discretion:

> A "general assignment to a court for a period of time" is exactly that – a "general" assignment that, [b]y its nature, does not continue indefinitely. In contrast, a "specific" assignment is to a specific case. If a specific judge is assigned to preside in a specific case, that assignment must be withdrawn before any other judge may do so. Thus here, the July 29 assignment order – not the December 21 assignment order – is the specific assignment. *By using the incorrect labels to interpret the assignment orders, the majority opinion renders the specific assignment meaningless.* ...
>
> *The second general assignment issued by [Judge Evans] – the December 21 assignment order – was superfluous, irrelevant to, and had no effect on the specific assignment order issued by [Judge Murphy]* in accordance with and pursuant to the authority granted to her by [Judge Evans] five months earlier. ...

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[106] *Id.* (emphasis added)(internal bracketing omitted).

[107] *Id.* at *3.

> Because [Judge Evans] gave [Judge Murphy] authority to assign Judge Gallagher, his specific assignment to the underlying cases in the July 29 assignment order was valid and continued unless and until it was terminated, as specifically stated in the order. *The case law is clear that once [Judge Evans] authorized [Judge Murphy's] reassignment (which she exercised in the July 29 assignment order), and there was no specific order assigning a new judge to the underlying cases (or valid basis to remove Judge Gallagher), Judge Gallagher was authorized to preside over the underlying cases to conclusion.*[108]

Justice Guerra's dissent reveals that the majority's affirmation of Judge Luong's ruling conflicts with "unequivocal, well-settled, and clearly controlling legal principles" and clearly entitles the State to relief.[109]

4. Paxton Procedurally Defaulted His Claim that Judge Gallagher's Authority to Preside Terminated Before He Changed Venue Because Paxton Failed To Voice His Objection in a Timely Manner and Obtain A Ruling On It At the Time the Basis for His Claim Became Apparent on January 2, 2017

The principle of procedural default is so essential to the criminal justice system that "it is a systemic requirement that must be reviewed by courts of appeals regardless of whether the issue is raised by the parties."[110] On one level, this doctrine exists "so that the trial court can

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[108] *Id.* (emphasis added).

[109] *Mau v. Third Court of Appeals*, 560 S.W.3d at 648; *In re McCann*, 422 S.W.3d at 704.

[110] *Ford v. State*, 305 S.W.3d 530, 532-33 (Tex.Crim.App. 2009).

avoid the error or provide a timely and appropriate remedy, and the opposing party has an opportunity to respond, and, if necessary, react."[111] But it also exists to keep a litigant from "sandbagging" the trial judge and opposing counsel in the interest of justice, equity, and fair play. This tactic is defined as, "The act or practice of a trial lawyer's remaining cagily silent when a possible error occurs at trial, with the hopes of preserving an issue for appeal if the court does not correct the problem."[112] No artifice is more condemned:

- "This court will not tolerate 'sandbagging' defense counsel lying in wait to spring post-trial error."[113]
- Opining that "requiring the [timely] objection means the defendant cannot 'game' the system..."[114]
- Rules requiring timely trial objections guard against defendants who "choose to say nothing about a judge's plain lapse. ... [T]he value of finality requires defense counsel to be on his toes, not just the trial judge, and the defendant who just sits there when a mistake can be

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[111] *Thomas v. State*, 408 S.W.3d 877, 884 (Tex.Crim.App. 2013).

[112] Black's Law Dictionary 1542 (Bryan A. Garner, ed., 10th ed. Thomson Reuters 2014). *See also Williams v. State*, ___ S.W.3d ___, 2021 WL 2132167 at *7 n. 47 (Tex.Crim.App. May 26, 2021)(not yet reported)(reversing court of appeals where the defendant's failure to urge a specific and timely objection "classically 'sand-bagged'" the trial judge); *Mays v. State*, 318 S.W.3d 368, 383 (Tex.Crim.App. 2010)(timely objection rule "prevent[s] a party from "sandbagging" the trial judge).

[113] *United States v. Sisto*, 534 F.2d 616, 624 n. 9 (5th Cir. 1976).

[114] *Puckett v. United States*, 556 U.S. 129, 134 (2009).

fixed just cannot sit there when he speaks up later."[115]

- "An accused may not sit idly by and allow irregular proceedings to occur without objection and afterwards seek to reverse his conviction by reason of those same irregularities."[116]

Ignoring this unbroken line of authority, the majority erroneously rewarded Paxton for sandbagging not just Judge Gallagher, but Judges Murphy and Evans, the regional administrative judges whose clear intent was for Judge Gallagher to preside over these underlying cases.[117] This record reveals that although Paxton knew in November 2015 that Judge Gallagher's appointment would purportedly end January 2, 2017, Paxton was silent, waiting well after venue was changed before untimely objecting to Judge Gallagher's order.[118] The majority's holding that "nothing in the record shows a lack of reasonable diligence in bringing this challenge"[119] is not merely mistaken; it is so clearly contrary to "unequivocal, well-settled, and clearly controlling legal principles" that it affords the State "a

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[115] *United States v. Vonn*, 535 U.S. 55, 73 (2002).

[116] *People v. Ford*, 168 N.E.2d 33, 40 (Ill. 1960).

[117] Emails between Judge Murphy and Judge Evans' assistants reveal their belief that Judge Gallagher's assignment need not be extended in light of Judge Murphy's July 29 order. Tab 31.

[118] Justice Goodman did not reach this contention. *Id.* at **9-12 (Goodman, J., *dissenting*).

[119] *In re Wice*, 2021 WL 2149332 at *5.

clear right" to mandamus relief.[120]

What Paxton knew about the facts and circumstances surrounding Judge Gallagher's assignment order and when he knew it is an amalgam of claims and assertions that changed like a chameleon. In his initial pleading in May 2017, Paxton said nothing about what he knew and when he knew it.[121] In July and December 2019, he persisted in his silence about what he knew and when he knew it about Judge Gallagher's assignment order.[122] It was not until December 17, 2019 that Paxton finally broke his silence and announced the big reveal: he "only became aware of [Judge Gallagher's] lack of authority when [he] filed [his] objection" in May 2017.[123] When the State objected that there was no evidence to support this assertion,[124] Paxton doubled down that he "didn't know [about the lapsed appointment] until May [and] couldn't have raised it earlier."[125]

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[120] *See Mau v. Third Court of Appeals*, 560 S.W.3d at 648.

[121] Tab 24.

[122] Tab 25; Tab 26.

[123] Tab 27 at 19.

[124] *Id.* at 19.

[125] *Id.* at 23.

Challenged again by the State about what he knew and when he knew it,[126] Paxton offered to "take testimony on that [via his counsel] who I think actually discovered this..."[127] Because no testimony was taken and [his counsel] did not have personal knowledge of this matter, Justice Goodman correctly held that, "There is no evidence in the record as to how or when Paxton's counsel discovered that Gallagher's appointment had expired."[128] In a post-hearing filing, Paxton again shifted gears, claiming for the first time he learned Judge Gallagher's appointment purportedly terminated "by happenstance after making a specific request seeking appointment documents to the regional administrative Judge..."[129] In his most recent filing, Paxton denied that he sandbagged Judge Murphy, Judge Evans, and Judge Gallagher because "[t]he record evidence shows that [he] objected shortly after he learned of it."[130]

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[126] *Id.* at 21.

[127] Paxton's failure to call his counsel to testify about what he knew and when he knew it gives rise to a presumption this testimony was unfavorable to Paxton. *See Bexar County Appraisal Dist. Bd. v. First Baptist Church*, 846 S.W.2d 554, 563 (Tex.App.– San Antonio 1993, writ den'd); *Dover Corp. v. Perez*, 587 S.W.2d 761, 767 (Tex.Civ.App.– Corpus Christi 1979, writ ref'd n.r.e.).

[128] *In re Wice*, 2021 WL 2149332 at *10 n. 1 (Goodman, J., *dissenting*).

[129] Tab 28 at 2.

[130] Tab 22 at 12.

But Paxton's "record evidence," the final thread of a narrative that convinced the majority he was not guilty of sandbagging Judge Gallagher, Judge Murphy, or Judge Evans shows that Paxton sandbagged the court of appeals as well. The record evidence on which Paxton relied is a letter Judge Murphy sent to Paxton's counsel on April 25, 2017, which Paxton asserted was the first time he learned of the lapsed appointment:[131]

> *Documents were delivered to you November 5, 2015* in response to your prior requests for information regarding Judge Gallagher's assignment to our region. Attached are *additional copies of the documents* we have that are responsive to your current request.[132]

The only logical interpretation of this letter is that Judge Murphy was sending Paxton's lawyers additional copies[133] of the very documents regarding "Judge Gallagher's assignment to our region" which she had already sent them on November 5, 2015. These documents make two things abundantly clear: (1) Paxton was on notice that Judge Gallagher's appointment would end on January 2, 2017 unless it was renewed; and (2)

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[131] *Id.* at 13. ("Mr. Paxton learned of it after requesting appointment documents from Judge Murphy, who sent them to Paxton's counsel on April 25, 2017.").

[132] Tab 29 (emphasis added).

[133] "Copy" has been defined as "An imitation or reproduction of an original; a duplicate." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 5th Ed. (2018).

the majority's belief that, "The State does not point out any specific event that should have triggered an inquiry into Judge Gallagher's assignment between January and May 2017,"[134] is a clear abuse of discretion.

This letter not only buttresses the conclusion that Paxton's objection was untimely, it destroys his claim he had no "irrebutable presumption of actual notice" of Judge Gallagher's lapsed appointment.[135] To be timely, Paxton's objection had to be made as soon as the objectionable nature of it became apparent[136] or "at the earliest opportunity."[137] Paxton provides no reason – apart from sheer coincidence – why this letter, *written almost a month after Judge Gallagher granted the State's motion to change venue*, could not have been written before January 2, 2017. The majority's holding that "nothing in the record shows a lack of reasonable diligence in bringing the challenge"[138] is a clear abuse of discretion that affords the State a clear right to mandamus relief.

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[134] *In re Wice*, 2021 WL 2149332 at *5.

[135] Tab 22 at 24.

[136] *Ethington v. State*, 819 S.W.2d 854, 858 (Tex.Crim.App. 1991).

[137] *Laurant v. State*, 926 S.W.2d 782, 783 (Tex.App.– Houston [1st Dist.] 1996, pet. ref'd).

[138] *In re Wice*, 2021 WL 2149332 at *5.

Paxton had *22 different chances* to bring this issue before Judge Gallagher and Judges Murphy and Evans, when any of them could have cured this defect and avoided unnecessary years of litigation.[139] But Paxton clings to the idea that because *Wilson*[140] holds that "pretrial means *before* trial,"[141] it is a blank tile in a game of Sandbag Scrabble. Not so. In *Wilson*, this Court stressed that "A timely objection [to a lapsed appointment] in the trial court will afford both the trial judge and the State notice of the procedural irregularity and *an adequate opportunity to take appropriate corrective action.*"[142] The majority's reliance on *Wilson* ignores the reason why error preservation requirements exist and are so strictly enforced to prevent a party from "sandbagging the trial judge,"[143] and constitutes a clear abuse of discretion.[144]

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[139] Tab 30.

[140] *Wilson v. State*, 977 S.W.2d 379, 380 (Tex.Crim.App. 1998)(objection to lapsed judicial appointment must be made prior to trial to be timely).

[141] Tab 22 at 16 (emphasis in original).

[142] *Wilson v. State*, 977 S.W.2d at 380 (emphasis added).

[143] *Speth v. State*, 6 S.W.3d 530, 536 (Tex.Crim.App. 1999)(Womack, J., *concurring*).

[144] The majority erroneously concluded this case was distinguishable from this Court's decision in *State v. Wachtendorf*, 475 S.W.3d 895, 903 (Tex.Crim.App. 2015). *In re Wice*, 2021 WL 2149332 at *5. In *Wachtendorf*, this Court held that the State's failure to exercise diligence in monitoring the district clerk's record to see when the trial judge signed the motion to suppress

Error preservation requirements "give[ ] the trial court a chance to consider the claimed error and, if appropriate, correct it."[145] Because the majority failed to enforce a cardinal rule that "is not a mere 'technicality' [but] rather one of the most important things that makes a fair trial fair,"[146] it neither honored precedent nor served justice. Because its ruling is foreclosed by "unequivocal, well-settled, and clearly controlling legal principles," the State has shown "a clear right" to mandamus relief.[147]

5. Because Paxton Consciously Decided Not to Challenge Judge Gallagher's Authority to Preside in his Petition for Mandamus in the Fifth Court of Appeals, Paxton Procedurally Defaulted his Claim Under the Law of the Case Doctrine

Paxton's mandamus petition *did not* claim that Judge Gallagher's venue ruling was void because his appointment ended in January 2017.[148]

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procedurally defaulted its claim. The only reason the majority offered why Paxton's lack of diligence is different from the State's in *Wachtendorf* is that "the terms of Judge Gallagher's assignment order was not in the trial court's record." *In re Wice*, 2021 WL 2149332 at *5. Because Paxton knew as far back as November 2015 that Judge Gallagher's appointment would end on January 2, 2017 unless it was renewed, this is a distinction wholly without a difference.

[145] *Luckenbach v. State*, 545 S.W.3d 567, 572 (Tex.App.– Houston [14th Dist.] 2018, pet. ref'd)(Frost, C.J., *concurring in the denial of en banc reconsideration*).

[146] *Willover v. State*, 38 S.W.3d 672, 674 (Tex.App.– Houston [1st Dist.] 2000, pet. grt'd) (Cohen, J.), *rev'd on other grounds*, 70 S.W.3d 841 (Tex.Crim.App. 2002).

[147] *Mau v. Third Court of Appeals*, 560 S.W.3d at 648; *In re State ex rel. Ogg*, 618 S.W.3d at 363; *In re McCann*, 422 S.W.3d at 704.

[148] *In re Paxton*, 2017 WL 2334242 at **1-5.

Granting Paxton mandamus relief, the Fifth Court of Appeals concluded:

- "[W]e agree with [Paxton] that [Judge Gallagher's] orders signed *after the transfer* [of venue] *order* are void..."[149]

- As a result of [Judge Gallagher's order transferring venue to Harris County on April 11, 2017] *jurisdiction over the cases vested in the Harris County district courts*, and the Collin County district court was divested of jurisdiction over the cases."[150]

- "We have already determined *that the signing of the transfer order vested jurisdiction in the Harris County District Courts* and divested the Collin County District Courts of jurisdiction over the cases."[151]

- "Jurisdiction over the cases vested immediately in the Harris County district courts *when* [Judge Gallagher] *signed the transfer order.*[152]

- "[Judge Gallagher's] *authority to act expired when the venue order became final. Consequently*, [his] *appointment also expired at that time.*"[153]

The State argued Paxton defaulted this claim by purposely deciding not to raise it in the court of appeals.[154] The majority disagreed "because

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[149] *Id.* at *1.

[150] *Id.* at *3. (emphasis added).

[151] *Id.* (emphasis added).

[152] *Id.* at * 4. (emphasis added).

[153] *Id.* at *5. (emphasis added).

[154] *In re Wice*, 2021 WL 2149332 at **4.

the Dallas Court of Appeals did not resolve whether Judge Gallagher had the authority to order a change of venue after the expiration of his appointment to the underlying cases."[155] This holding is a clear abuse of discretion as the law of the case doctrine not only prohibits litigation of issues that *were* decided,[156] but also issues that *could* have been decided:

- "An issue that could have been but was not raised on appeal is forfeited and may not be considered during a second appeal."[157]

- "It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who has argued and lost."[158]

- "The most rudimentary procedural efficiency demands that litigants present all available arguments to an appellate court on the first appeal."[159]

- "The law-of-the-case doctrine bars challenges to a decision made at a previous stage of the litigation which could have been challenged in a prior appeal, but were not. A party who could have sought review of an issue or ruling during a prior appeal is deemed to have

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[155] *Id.*

[156] *See e.g., State v. Swearingen*, 478 S.W.3d 716, 720 (Tex.Crim.App. 2015)(under the law of the case doctrine, "[W]hen the facts and legal issues are virtually, they should be controlled by an appellate court's previous resolution [of them].").

[157] *Lindquist v. City of Pasadena*, 669 F.3d 225, 239-40 (5th Cir. 2012).

[158] *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2nd Cir. 1981).

[159] *Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 974 F.2d 502, 505 (4th Cir. 1992).

waived the right to challenge that decision thereafter."[160]

While this Court has not decided a case on these facts,[161] the State is still entitled to mandamus relief if "the principle of law [driving this issue] is so plainly prescribed as to be free from doubt."[162] The foundation of the majority's decision – that the court of appeals was never called upon to resolve the issue of Judge Gallagher's lapsed appointment – collapses under its own weight. The best evidence that Paxton could have raised this issue is that he saw fit to include copies of Judge Murphy's and Judge Evans' appointment orders in his appendix.[163]

Unable to respond to this complaint on the merits, Paxton rebuked the State for arguing he "consciously decided to not raise this issue ... in his original mandamus petition before venue was changed,"[164] because it

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[160] *United States v. Adesida*, 129 F.3d 846, 850 (6th Cir. 1997).

[161] While not binding, this Court has long held that federal law is persuasive and entitled to due weight and consideration, *Laney v. State*, 117 S.W.3d 854, 858 (Tex.Crim.App. 2003), as it has only recently reaffirmed. In *Tilghman v. State*, 624 S.W.3d 801, 807-811 (Tex.Crim.App. 2021), this Court relied on authority from the Eighth and Ninth Circuits, and unpublished opinions from the Sixth, Seventh, and Ninth Circuits. In *Pugh v. State*, 624 S.W.3d 565, 568-69 (Tex.Crim.App. 2021), this Court relied on decisions from the Second, Ninth, and Tenth Circuit, and an unpublished Ninth Circuit opinion.

[162] *Wice v. Fifth Court of Appeals*, 581 S.W.3d at 194.

[163] Tab 23 at 2-3.

[164] Tab 22 at 11.

could not know what Paxton "consciously decided."[165] But this Court need not be able to read Paxton's mind to see that his rejoinder fails. As the State's top prosecutor, Paxton is charged with the knowledge of this Court's precedent that a defendant's intent can be readily inferred from his conduct and the circumstances surrounding it.[166]

The circumstances surrounding Paxton's conduct in not raising this issue when he should have raised it, is compelling circumstantial evidence of his intent to consciously "hold in reserve an argument regarding [Judge Gallagher's appointment]."[167] As the Second Circuit Court of Appeals has opined, "It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who has argued and lost."[168] If Paxton done what the law of the

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[165] *Id.*

[166] *See e.g., Hernandez v. State*, 819 S.W.2d 806, 810 (Tex.Crim.App. 1991)("A jury may infer intent from any facts which tend to prove its existence, including the acts, words, and conduct of the accused..."); *Manrique v. State*, 994 S.W.2d 640, 642-43 (Tex.Crim.App. 1999)(defendant's intent to kill could reasonably be inferred from his statement that he was "trying to 'light up' a house that contained more than four people, and he and his companion fired at least 26 shots").

[167] *See Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 974 F.2d at 505 (condemning this tactic because doing so "would be unfair to opposing parties, encourage piecemeal appeals, and undermine our procedural efficiencies.").

[168] *Fogel v. Chestnutt*, 668 F.2d at 109.

case doctrine required him to do in May 2017, the issue of whether Judge Gallagher's appointment lapsed would have long since been resolved and years of unnecessary litigation avoided. Because the principle of law animating this question of first impression is "so plainly prescribed as to be free from doubt," the State has shown a clear right to mandamus relief.

PRAYER FOR RELIEF

The State prays that this Court issue a writ of mandamus to:

- vacate the court of appeals' ruling denying the State's petition for mandamus and returning venue in these matters to Collin County;
- compel the trial court to issue a new order for payment to the State as required by this Court's mandate issued on June 19, 2019; and
- grant Nicole DeBorde's unopposed motion to withdraw.

RESPECTFULLY SUBMITTED,

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ON BEHALF OF THE STATE OF TEXAS

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that I have reviewed this petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record or by judicial notice.

I certify that, according to Word Perfect, the portion of this petition for which Tex. R. App. P. 9.4.(i)(1) requires a word count contains 6856 words, subject to the State's request to exceed the word limit in this rule.

Pursuant to Tex. R. App. P. 9.5(d), I certify that this document was served on Real Party In Interest's counsel of record and on Respondent by serving the Clerk of the Court via electronic filing on October 4, 2021.

/s/ BRIAN W. WICE

BRIAN W. WICE

NO. WR-93,089-01

IN THE

COURT OF CRIMINAL APPEALS

IN RE THE STATE OF TEXAS EX REL. BRIAN W. WICE, RELATOR.

ON STATE'S PETITION FOR WRIT OF MANDAMUS
AGAINST THE FIRST COURT OF APPEALS

ANCILLARY TO CAUSE NOS. 1555100, 1555101, 1555102
IN THE 185TH CRIMINAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

APPENDIX TO STATE'S PETITION FOR WRIT OF MANDAMUS

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THE STATE OF TEXAS

ORAL ARGUMENT REQUESTED

INDEX TO RELATOR'S APPENDIX

7	Certified Demand Letter from Collin County Auditor Linda Riggs to Relator Demanding Repayment of Attorneys Fees for 2015 Work (Nov. 22, 2019)
8	Letter from Barry Abrams, Relator's Counsel, Explaining Why Collin County's Demand for Repayment of 2015 Attorneys Fees is Legally Without Merit (Dec. 4, 2019)
9	Reporter's Record of Judge Johnson's Ruling Granting Paxton's Motion and Returning the Underlying Cases to Collin County (June 25, 2020)
10	Relator's Motion for Ex Parte Determination of New Order for Payment of Attorneys Fees (July 17, 2019)
11	Nicole DeBorde's Unopposed Motion for Leave to Withdraw as Attorney Pro Tem (June 25, 2019)
12	Reporter's Record of Hearing on Paxton's Motion to Set Aside Change of Venue as Void and Return the Underlying Cases to Collin County (Dec. 17, 2019)

13 Judge Johnson's Order Granting Paxton's Motion to Set Aside Change of Venue as Void and Return the Underlying Cases to Collin County
(June 25, 2020)

14 First Court of Appeals' Order Granting Relator's Request for a Stay of Judge Johnson's Order
In re State ex rel. Brian W. Wice
(July 7, 2020)

15 First Court of Appeals' Order Abating and Remanding Relator's Petition for Mandamus to Allow Judge Luong to Reconsider Judge Johnson's Prior Order
In re State ex rel. Brian W. Wice
(July 28, 2020)

16 Judge Luong's Orders Adopting Judge Johnson's Prior Order Returning the Underlying Cases to Collin County
(Oct. 23, 2020)

17 First Court of Appeals' Order Denying Relator's Motion for Reconsideration En Banc and Lifting Its Stay Entered June 15, 2021
In re State ex rel. Brian W. Wice
(Sept. 9, 2021)

24 Paxton's Objection to Judge Gallagher's Orders After his Assignment Order Expired (May 10, 2017)

25 Paxton's Motion to Set Aside Change of Venue As Void and Return Cases to Collin County (July 18, 2019)

26 Paxton's Reply to State's Response to Motion to Return Venue to Collin County (Dec. 13, 2019)

27 Reporter's Record of Remote Hearing Before Judge Johnson Resetting Proceedings (June 20, 2020)

28 Paxton's Post Hearing Memorandum to Correct [sic] Inaccurate Arguments by the State (Jan. 7, 2020)

29 Letter from Mary Murphy to Philip Hilder, Paxton's Co-Lead Counsel on Apr. 25, 2017 Paxton's Appendix Exhibit A 126 p. 1 *In re State ex rel. Brian W. Wice* (July 2, 2020)

30 Time Line of Paxton Failing to Object to Judge Gallagher's Lapsed Appointment
Appendix A: Relator's Reply to Paxton's Response on Reconsideration En Banc
In re State ex rel. Brian W. Wice
(July 23, 2021)

31 Emails Regarding Judge Gallagher's Initial Order of Assignment and Why There was no Need to Extend his Initial Assignment Order Between Alisa Frame, Administrative Asst. to Regional Administrative Judge Mary Murphy and Tracy Kemp, Administrative Asst. to Regional Administrative Judge David Evans
Paxton's Appendix Exhibit A 126 pp. 9-12
In re State ex rel. Brian W. Wice
(Jan. 24, 2017)

32 Paxton's Objection to Excessive or Interim Payment of Fees to Attorneys Pro Tem
(Dec. 29, 2015)

CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. P. 9.5(d), I certify that this document was served on all counsel of record via electronic filing on September 27, 2021.

/s/ BRIAN W. WICE

BRIAN W. WICE

APPENDIX TAB 1

2021 WL 2149332
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Houston (1st Dist.).

IN RE the STATE of Texas EX
REL. Brian W. WICE, Relator

NO. 01-20-00477-CR, NO. 01-20-00478-CR, NO. 01-20-00479-CR

Opinion issued May 27, 2021

Original Proceeding on Petition for Writ of Mandamus

Attorneys and Law Firms

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Michael Mowla, Duncanville, Dan L. Cogdell, Houston, William B. Mateja, Dallas, Philip H. Hilder, Houston, for Real party in interest.

Panel consists of Justices Goodman, Hightower, and Countiss.

OPINION

Julie Countiss, Justice

***1** Relator, Brian W. Wice, on behalf of The State of Texas (the "State"), filed a petition for writ of mandamus, requesting that this Court vacate a June 25, 2020 order signed by the Honorable Robert Johnson of the 177th District Court of Harris County, Texas that vacated a previous change of venue order and returned the underlying cases to Collin County, Texas. [1] Relator also requests that this Court compel the trial court to rule on certain motions.

While the mandamus petition was pending in this Court, Judge Johnson recused himself from the underlying cases and they were reassigned to Respondent, the Honorable Jason Luong of the 185th District Court of Harris County. We abated the proceedings to allow Respondent to reconsider the challenged June 25, 2020 order and, if necessary, to rule on other pending motions. [2] Respondent then entered an October 23, 2020 order finding that the trial court lacked jurisdiction to reconsider Judge Johnson's order and alternatively, even if the trial court had jurisdiction, Judge Johnson was correct in vacating the change of venue order and returning the underlying cases to Collin County. We reinstated the original proceedings on the Court's active docket, and the State supplemented its mandamus petition to challenge Respondent's October 23, 2020 order.

In three issues, the State contends that Respondent erred in vacating the previous change of venue order, returning the underlying cases to Collin County, and not ruling on certain motions.

We deny the petition.

Background

Wice serves as Collin County District Attorney *Pro Tem* prosecuting three underlying felony criminal cases brought against Real Party in Interest, Warren Kenneth Paxton, Jr. ("Paxton"), in Collin County on July 28, 2015. The cases were originally assigned to the Honorable Chris Oldner of the 416th District Court of Collin County. [3] Judge Oldner promptly recused himself and the next day, the cases were assigned by the Presiding Judge of the First Administrative Judicial Region (the "First Region") to the Honorable George Gallagher of the 396th District Court of Tarrant County, Texas.

Judge Gallagher, whose elected bench is in the Eighth Administrative Judicial Region (the "Eighth Region"), [4] was assigned to the First Region by the Eighth Region's Presiding Judge at the request of the First Region's Presiding Judge. The order of the Eighth Region's Presiding Judge assigned Judge Gallagher to the First Region "for a period of 157 days, beginning July 28th, 2015." It also provided that "[i]f the judge beg[an] a trial on the merits during the period of th[e] assignment, the assignment continue[d] in such case until plenary jurisdiction ha[d] expired" or the Eighth Region's Presiding Judge "ha[d] terminated th[e] assignment in writing, whichever occur[red] first."

***2** A second assignment order from the Eighth Region's Presiding Judge, signed on December 21, 2015, extended Judge Gallagher's assignment to the First Region for a "period of 366 days, beginning January 1, 2016." The order also provided that "[i]f the judge beg[an] a trial on the merits during the period of th[e] assignment the assignment continue[d] in such case until plenary jurisdiction ha[d] expired" or the Eighth Region's Presiding Judge "ha[d] terminated th[e] assignment in writing, whichever occur[red] first." And the First Region's Presiding Judge signed an order extending Judge Gallagher's assignment to the underlying cases "from October 23, 2015 until such time as necessary to complete any actions required by Judge Gallagher as the presiding judge in the above matter, unless the assignment [was] earlier terminated by the Presiding Judge of the [First Region]."

Judge Gallagher did not begin a trial on the merits within the 366 days of the assignment by the Eighth Region's Presiding Judge, so that assignment, by its terms, expired on January 2, 2017. [5] The same day, the Honorable Andrea Thompson succeeded Judge Oldner and began presiding over the 416th District Court of Collin County.

Judge Gallagher nevertheless continued to preside over the underlying cases. On February 9, 2017, the State moved to change venue from Collin County to Harris County. On March 30, 2017, Judge Gallagher granted the State's motion to change venue, and on April 11, 2017, he issued a supplemental order changing venue to Harris County.

On May 10, 2017, Paxton objected to Judge Gallagher's venue rulings, asserting that they were void because his assignment by the Eighth Region's Presiding Judge had expired before they were made. In response, Relator asserted that Paxton's objection was a motion for relief and, because of the venue ruling, asked that it be heard in Harris County. Judge Gallagher did not rule on the objection, and, on May 12, 2017, he ordered that the objection be heard in Harris County.

Before a hearing could go forward in Harris County, a series of mandamus petitions were filed in the Dallas Court of Appeals and the Court of Criminal Appeals. Among those petitions was a May 15, 2017 petition for writ of mandamus filed by Paxton in the Dallas Court of Appeals, which complained that Judge Gallagher continued to act in the underlying cases after they had been transferred to Harris County. *See In re Paxton*, Nos. 05-17-00508-CV, 05-17-00509-CV, — S.W.3d ——, 2017 WL 2334242 (Tex. App.—Dallas May 30, 2017, orig. proceeding).

On June 9, 2017, the Collin County District Clerk transferred the case files to Harris County. On June 13, 2017, the underlying cases were randomly assigned to the 177th District Court of Harris County, Judge Johnson presiding. On July 18, 2019, Paxton filed a motion with that court asking it to vacate Judge Gallagher's change of venue order as void and return the cases to Collin County. Judge Johnson signed an order granting Paxton's motion on June 25, 2020.

On June 30, 2020, Relator filed its mandamus petition in this Court, related to each of the underlying cases, requesting that we vacate Judge Johnson's June 25, 2020 order and compel Judge Johnson to rule on certain pending motions. [6] Relator moved to stay enforcement of the June 25, 2020 order pending resolution of the mandamus proceedings. We granted Relator's motion to stay on July 7, 2020.

***3** Relator then informed this Court that Judge Johnson had voluntarily recused himself from the underlying cases on July 6, 2020 and the cases had been reassigned on July 15, 2020 to the 185th District Court of Harris County, Judge Luong presiding. On July 28, 2020, we abated the original proceedings to allow Respondent to reconsider the challenged June 25, 2020 order and, if appropriate, to consider the pending motions about which Relator complains. [7] On October 23, 2020, in an "Order of Reconsideration of Prior Order Vacating Order of Transfer to Harris County," Respondent found:

> [The trial court's] plenary jurisdiction to review the June 25, 2020 [order] ha[d] expired.
>
> The June 25, 2020 order effectively transferred the case back to Collin County, Texas, and jurisdiction immediately and automatically vest[ed] in the transferee court—that is, the 416th District Court of Collin County, Texas. The [First Court of Appeals's] order of abatement and request for reconsideration was issued on July 28, 2020.
>
> Accordingly, th[e] [trial] [c]ourt [was] without jurisdiction to review the challenged order or any pending motions in the[ ] cases.

Alternatively, Respondent held:

> [I]f it is determined by the First Court of Appeals, or by any other or higher appellate court that the 185th Judicial District Court d[id] have jurisdiction to review and reconsider the June 25, 2020 [o]rder, it [was] the [trial] [c]ourt's finding that Judge Gallagher was without jurisdiction to enter the March 30, 2017 [change of venue] order, that the March 30, 2017 order and related venue orders should be set aside, and that the Harris County District Clerk's file should be transferred to the Collin County District Clerk.

Relator apprised this Court of Respondent's October 23, 2020 order, moved to stay its enforcement, and supplemented its mandamus petition. Paxton reasserted his response to the original mandamus petition.

On October 29, 2020, we lifted the abatement and reinstated the original proceedings on the Court's active docket. We also granted Relator's motion to stay enforcement of Respondent's October 23, 2020 order and clarified that our previous stay of Judge Johnson's June 25, 2020 order remained in effect.

Standard of Review

Mandamus relief is available in a criminal case when (1) the relator has shown that no other adequate remedy at law is available and (2) the act the relator seeks to compel is ministerial, not discretionary. *Braxton v. Dunn*, 803 S.W.2d 318, 320 (Tex. Crim. App. 1991); *Dickens v. Ct. of App. for Second Supreme Judicial Dist. of Tex.*, 727 S.W.2d 542, 548–49, 552 (Tex. Crim. App. 1987) (applying standard to pretrial matter). An act is ministerial "where the law clearly spells out the duty to be performed ... with such certainty that nothing is left to the exercise of discretion or judgment." *Tex. Dep't of Corrections v. Dalehite*, 623 S.W.2d 420, 424 (Tex. Crim. App. 1981). "[T]he relator must have a clear right to the relief sought, meaning that the merits of the relief sought are beyond dispute." *In re McCann*, 422 S.W.3d 701, 704 (Tex. Crim. App. 2013) (internal quotations omitted). "[A]lthough an issue may be one of first impression, it does not necessarily follow that the law is not well-settled"; an appellate court may grant mandamus relief "based on a well-settled, but rarely litigated point of law." *Id.*

A writ addressing pretrial matters in criminal cases may issue to correct a "clear abuse of discretion" by the trial court. *See Dickens*, 727 S.W.2d at 549–50. The trial court abuses its discretion if its ruling is "arbitrary and unreasonable, made without regard for guiding legal principles or supporting evidence." *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016). A trial court also abuses its discretion if it "fails to analyze or apply the law correctly." *Id.*

***4** Mandamus is available when a trial court enters an order without authority. *In re State ex rel. Sistrunk*, 142 S.W.3d 497, 503 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding). A trial court has a ministerial duty to vacate a void order. *In re Paxton*, —— S.W.3d at ——, 2017 WL 2334242, at *5. A trial court's order is void if the record shows the trial court had no jurisdiction over the parties, no subject-matter jurisdiction, no jurisdiction to enter the order, or no capacity to act as a court. *See id.* at ——, 2017 WL 2334242 at *3.

Validity of Change of Venue Order

In its first issue, the State argues that Respondent erred in ordering that Judge Gallagher's change of venue order be set aside and that the underlying cases be returned to Collin County based on the expiration of the appointment order because (1) Paxton is foreclosed from challenging the validity of the change of venue order because the Dallas Court of Appeals already decided that issue in a prior mandamus proceeding; (2) Paxton failed to timely preserve his objection to the change of venue order's validity; (3) the appointment orders gave Judge Gallagher the authority to order the change of venue; and (4) Judge Gallagher could continue to preside over the underlying cases pursuant to an exchange of benches under Texas Constitution Article V, section 11. [8]

A. Law of the Case

The State argues that Respondent erred in vacating Judge Gallagher's change of venue order because the law of the case doctrine forecloses Respondent's conclusion that the trial court lacked jurisdiction to review Judge Gallagher's change of venue order or any pending motions in the underlying

cases. According to the State's reading of the Dallas Court of Appeals' decision in *In re Paxton*, the Dallas Court of Appeals already determined that Judge Gallagher's authority to act terminated only after he granted the State's motion to transfer venue from Collin County to Harris County.

"The law of the case doctrine provides that an appellate court's resolution of questions of law in a previous appeal are binding in subsequent appeals concerning the same issue." *State v. Swearingen*, 424 S.W.3d 32, 36 (Tex. Crim. App. 2014) (internal quotations omitted). "In other words, when the facts and legal issues are virtually identical, they should be controlled by an appellate court's previous resolution." *Id.* The doctrine is designed to promote judicial consistency and efficiency by eliminating the need for appellate courts to prepare opinions discussing previously resolved matters. *Howlett v. State*, 994 S.W.2d 663, 666 (Tex. Crim. App. 1999); *see also Swearingen*, 424 S.W.3d at 36.

We do not agree with the State's understanding of the scope of the Dallas Court of Appeals's decision in *In re Paxton*. In that mandamus proceeding, Paxton challenged Judge Gallagher's authority to continue to preside over the underlying cases without Paxton's consent "because a judge that orders a change in venue in a criminal case may continue to preside over the case after the transfer and continue to use the transferor court's administrative resources only if the State, the defendant, and the defendant's counsel consent." *In re Paxton*, —— S.W.3d at ——, 2017 WL 2334242, at *2. The Dallas Court of Appeals thus addressed whether Judge Gallagher had the authority to enter orders *after* issuing the change of venue order; it did not consider whether Judge Gallagher had the authority to order the change of venue to Harris County. *See id.* at ——, ——, 2017 WL 2334242 at *2, *3. Because the Dallas Court of Appeals did not resolve whether Judge Gallagher had the authority to order a change of venue after the expiration of his assignment to the underlying cases, the law of the case doctrine does not prevent us from resolving that issue here.

B. Failure to Preserve Objection

***5** The State also argues that Respondent erred in vacating Judge Gallagher's change of venue order because Paxton forfeited any argument that Judge Gallagher lacked authority to keep acting after the expiration of his appointment by failing to raise a timely objection on that ground as soon as the basis for it became apparent "or was subject to discovery with ... reasonable diligence during the first week of January 2017." *See* *Marin v. State*, 851 S.W.2d 275, 279–80 (Tex. Crim. App. 1993) (discussing rights subject to forfeiture by "failure to insist upon [them] by objection, request, motion, or some other behavior calculated to exercise the right[s] in a manner comprehensible" to trial court).

Paxton first raised the issue of the terms of Judge Gallagher's appointment with the First Region's Presiding Judge in May 2017, a month after filing his mandamus petition in the Dallas Court of Appeals. In July 2019, Paxton moved the trial court to set aside Judge Gallagher's change of venue order on that ground. The State cites *State v. Wachtendorf*, for the proposition that by exercising diligence, Paxton could have discovered the terms of Judge Gallagher's appointment earlier. 475 S.W.3d 895 (Tex. Crim. App. 2015). But *Wachtendorf* concerned whether the State had constructive notice that the trial court had signed an order. *See id.* at 903. The Court of Criminal Appeals rejected the State's attempt to appeal an order suppressing evidence as untimely because the State "could have exercised diligence to monitor the district clerk's record." *Id.*

The facts here are different from those in *Wachtendorf*. The mandamus record shows that information about the terms of Judge Gallagher's assignment was not in the trial court's record. And the absence of the assignment orders from the record, standing alone, would not have reasonably alerted Paxton that he needed to find them. Like notice of exchange of benches,[9] "[n]otice of assignment is clearly optional and not mandatory." *Turk v. First Nat'l Bank of W. Univ. Place*, 802 S.W.2d 264, 265 (Tex. App.—Houston [1st Dist.] 1990, writ denied). The State does not point out any specific event that should have triggered an inquiry into the terms of Judge Gallagher's assignment between January and May 2017. And, from May 2017 until July 2019, when he moved to set aside the change of venue order, Paxton did not seek any affirmative relief from the Harris County district court.

The Court of Criminal Appeals has concluded that a defendant's right to challenge the authority of a trial judge, who is otherwise qualified,[10] to preside pursuant to an expired assignment, is in the category of rights subject to forfeiture under *Marin*. *See* *Wilson v. State*, 977 S.W.2d 379, 380 (Tex. Crim. App. 1998); *see also* *Marin*, 851 S.W.2d at 279–80. But it held that a defendant may preserve that issue if the objection is raised pretrial. *See* *id.* Here,

Paxton challenged Judge Gallagher's authority to preside pursuant to an expired assignment before trial, and nothing in the record shows a lack of reasonable diligence in bringing the challenge. We therefore hold that it was not an abuse of discretion for the trial court to conclude that Paxton did not forfeit his challenge to Judge Gallagher's authority to order the change of venue.

C. Authority Under the Assignment Orders

*6 The State argues that Respondent erred in vacating Judge Gallagher's change of venue order because the appointment orders gave Judge Gallagher the authority to order the change of venue to Harris County.

In response to the First Region Presiding Judge's request for the assignment, the order of the Eighth Region's Presiding Judge extended Judge Gallagher's assignment to the 416th District Court of Collin County for a "period of 366 days, beginning January 1, 2016." But the State asserts that Judge Gallagher still had the authority to continue to preside over the underlying cases when he signed the change of venue order on March 30, 2017 because the terms of the assignment order signed by the First Region's Presiding Judge, assigned Judge Gallagher to the underlying cases "until such time as necessary to complete any actions required by Judge Gallagher as the presiding judge in the above matter, unless the assignment is earlier terminated...."

A judge sitting by order of assignment "has all the powers of the judge of the court to which he is assigned." TEX. GOV'T CODE ANN. § 74.059(a). Generally, visiting judges are assigned either to a particular case or for a period of time. *Hull v. S. Coast Catamarans, L.P.*, 365 S.W.3d 35, 41 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *In re Republic Parking Sys., Inc.*, 60 S.W.3d 877, 879 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Typical assignment orders provide that the visiting judge's authority terminates on a date specified in the assignment order or on the occurrence of a specific event, such as the signing of a judgment or ruling on a motion for new trial. *Hull*, 365 S.W.3d at 41. The terms of the assignment order control the scope of the visiting judge's authority and when that authority terminates. *Id.*; *In re Richardson*, 252 S.W.3d 822, 828 (Tex. App.—Texarkana 2008, no pet.); *Mangone v. State*, 156 S.W.3d 137, 139–40 (Tex. App.—Fort Worth 2005, pet. ref'd).

We understand the assignment order of the Presiding Judge for the Eighth Region as defining the outer limit of Judge Gallagher's assignment. Judge Gallagher was assigned to the underlying cases pursuant to the Texas Government Code section 74.056(b), which permits "[t]he presiding judge of one administrative region" to ask "the presiding judge of another administrative region to furnish judges to aid in the disposition of litigation pending in a county in the administrative region of the presiding judge who makes the request." TEX. GOV'T CODE ANN. § 74.056(b). Judge Gallagher's authority to act in the underlying cases derived from the orders of the Presiding Judges for the Eighth and First Regions, respectively, assigning Judge Gallagher to preside over them.

Section 74.056(b) provides that "[t]he presiding judge of one administrative region may request the presiding judge of another administrative region to furnish judges to aid in the disposition of litigation pending in a county in the administrative region of the presiding judge who makes the request." *See id.* The request of the First Region's Presiding Judge led the Eighth Region's Presiding Judge to assign Judge Gallagher according to certain terms, and the Presiding Judge for the First Region's acceptance of Judge Gallagher's assignment was necessarily pursuant to those terms. Interpreting section 74.056(b) as allowing the receiving judicial administrative presiding judge to unilaterally dictate the terms of an assignment would thwart regional oversight and conflict with the purpose of regional administrative management. [11]

*7 We also reject the State's proposed interpretation of the two assignment orders because it places the orders in direct conflict with each other and renders the specific term of the assignment set forth in the Eighth Region Presiding Judge's order meaningless, contrary to well-settled rules of construction. Under those rules, specific provisions control over general provisions, provisions stated earlier in an agreement are favored over later provisions, and the interpretation should not render any material terms meaningless. *See* *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995). Applying these rules to the two assignment orders, we conclude that they can be reasonably read to agree that Judge Gallagher's assignment to the 416th District Court of Collin County was to end on January 2, 2017. *See* TEX. R. CIV. P. 4; TEX. R. APP. P. 4.1.

D. Authority Through the Exchange of Benches

The State also argues that Respondent erred in vacating Judge Gallagher's change of venue order because the change of venue order was valid. The State asserts that after his appointment to the underlying cases in the 416th District Court of Collin County expired, Judge Gallagher was authorized to sit without an appointment order.

According to the State, the Texas Constitution provides that "the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law." TEX. CONST. art. V, § 11. [12] "The expression 'whenever they deem it expedient' ... confers on district judges broad discretionary powers to exchange benches, or hold court for each other, which is reviewable only if an abuse of discretion has occurred." *Floyd v. State*, 488 S.W.2d 830, 832 (Tex. Crim. App. 1972). And "[a]lthough better practice would require one, the exchange may be accomplished without the necessity of a formal order or entry on the record of the reasons for such exchange." *Id.*

"[W]here no objection is made to the right of a judge from another district to sit in a case, all objections to his authority to sit are considered waived and it is presumed the judge was in regular discharge of his duties pursuant to the statute authorizing an exchange of benches." *Id.* Here, though, Paxton challenged Judge Gallagher's authority to continue to sit in the underlying cases and proved through administrative records that his appointment had expired before Judge Gallagher ruled on the State's motion to change venue. Because Paxton objected to Judge Gallagher's authority, any presumption that Judge Gallagher "was in regular discharge of his duties" does not apply. We also decline to entertain a presumption that Judge Gallagher's appointment was automatically converted to an exchange of benches on these facts because such precedent would create confusion about the scope of assignment orders and undermine the effectiveness of the Court Administration Act. *See, e.g.*, TEX. GOV'T CODE ANN. § 74.001(b)(4) (calling for annual meeting of presiding judges of administrative judicial regions to "promote more effective administration of justice through the use of this chapter"); *see also Roberts v. Ernst*, 668 S.W.2d 843, 846 (Tex. App.—Houston [1st Dist.] 1984, orig. proceeding) (refusing to agree that initial exchange of benches between judges was done pursuant to Texas Constitution Article V, section 11 where judge's authority had ceased under terms of assignment order).

***8** The relator bears the burden of showing entitlement to mandamus relief. *See Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). There is nothing in the mandamus record showing that Judge Gallagher, whose appointment ended January 2, 2017 and Judge Thompson, who was sworn in as the judge of the 416th District Court of Collin County on that same day, agreed to exchange benches pursuant to Texas Constitution Article V, section 11. We therefore conclude that the State has failed to meet its burden of showing that Judge Gallagher continued to have authority to sit in the underlying cases past the expiration of the assignment orders. *See Roberts*, 668 S.W.2d at 846. As a result, we hold that the State has not shown that it is entitled to mandamus relief. [13]

Conclusion

We deny the petition for writ of mandamus. *See* TEX. R. APP. P. 52.8(a). We lift the stay imposed by our July 7, 2020 and October 29, 2020 orders. All pending motions are dismissed as moot.

Goodman, J., concurring and dissenting.

CONCURRING AND DISSENTING OPINION

Gordon Goodman, Justice

The State petitions for mandamus relief arguing that the trial court abused its discretion in vacating an order that transferred these cases from Collin County to Harris County. The majority disagrees and denies the State's petition on the ground that the transfer order is void. Among other things, the majority holds that:

(1) the district judge who transferred these cases from Collin County to Harris County lacked the authority to do so because he presided over these cases under a statutory assignment and this statutory assignment had expired before he entered the transfer order; and

(2) Article V, Section 11 of the Texas Constitution, which allows a district judge to hold court for another when they deem it expedient, did not allow the district judge to continue presiding after his statutory assignment expired

because this interpretation would thwart the statutory scheme.

With respect to the first prong of the majority's holding, I concur because the majority reaches the right result but does so for the wrong reasons. As to the second prong of the majority's holding, I respectfully dissent from it altogether.

Background

At the heart of this petition lies a dispute between the State and Ken Paxton about where the underlying criminal cases should be tried. The State prefers that they be tried in Harris County. Paxton prefers that they be tried in Collin County.

The procedural posture of this petition is straightforward. At the request of the presiding judge of the First Administrative Judicial Region, in which Collin County is located, the presiding judge of the Eighth Administrative Judicial Region, in which Tarrant County is located, assigned Tarrant County District Judge George Gallagher to preside over these cases in the 416th District Court of Collin County. But the presiding judges of these two administrative regions entered conflicting orders as to the duration of the assignment. The presiding judge of the Eighth Region assigned Gallagher for a set number of days, unless the cases went to trial during this period, in which case Gallagher was to shepherd them to final judgments, subject to termination of the assignment at an earlier date by the presiding judge for the Eighth Region. In contrast, the presiding judge of the First Region assigned Gallagher to preside over these cases indefinitely, unless this presiding judge of the First Region terminated the assignment at an earlier date.

***9** The State eventually requested that Gallagher transfer these cases to Harris County, and Gallagher did so. *See* TEX. CODE CRIM. PROC. art. 31.02 (authorizing transfer on prosecution's motion when fair and impartial trial cannot be had in county in which case is pending). It is undisputed that Gallagher's assignment had expired under the terms of the order entered by the presiding judge of the Eighth Region when Gallagher transferred these cases to Harris County.

Paxton objected to Gallagher's transfer order, but Gallagher did not rule on the objection. Instead, Gallagher ordered that Paxton's objection be heard by the Harris County district court to which the cases would be transferred.

The Harris County district court sustained Paxton's objection. It vacated Gallagher's transfer order, returning the cases to Collin County, on the basis that Gallagher's assignment had expired before he transferred the cases. In its mandamus petition, the State contests the order vacating the transfer order.

Analysis

First Prong of the Majority's Holding

The majority first holds that the more definite assignment order of the presiding judge of the Eighth Region trumps the broader one entered by the presiding judge of the First Region. The majority reasons that construing Section 74.056(b) of the Government Code "as allowing the receiving judicial administrative presiding judge to unilaterally dictate the terms of an assignment would thwart regional oversight and conflict with the purpose of regional administrative management." The majority further reasons that the more definite order prevails over the broader one under well-established canons of interpretation.

While the majority reaches the right result, it does so for the wrong reasons. Section 74.056(b) provides that a "presiding judge of one administrative region may request the presiding judge of another administrative region to furnish judges to aid in the disposition of litigation pending in a county in the administrative region of the presiding judge who makes the request." The statute expressly provides that one administrative judge may request that another administrative judge furnish judges. In this context, a request is the act of formally asking for something, and furnish means to supply, give, or provide. NEW OXFORD AMERICAN DICTIONARY 705, 1483 (3d ed. 2010). If the presiding judge of one administrative region could simply commandeer judges from another administrative region, that presiding judge would not need to formally ask the presiding judge of the other administrative region for this aid and the presiding judge of the other administrative region would not need to supply, give, or provide this aid. In other words, the result that the majority intuits from the statutory scheme's purpose inheres in the plain language of the statute.

When, as here, a statute's language is clear and unambiguous, our analysis ends because the Legislature must be understood to mean what it expressed. *Day v. State*, 614 S.W.3d 121, 127 (Tex. Crim. App. 2020). Under these circumstances,

we discern the Legislature's intent, and thus the statute's purpose, from the plain meaning of the statutory text alone, not inferences drawn from the statutory scheme. *Id.*; *State v. Doyal*, 589 S.W.3d 136, 149 (Tex. Crim. App. 2019).

And if Section 74.056(b) left any doubt as to who has the authority to assign judges to another administrative region, another provision in this statutory framework would eliminate that doubt altogether. Section 74.058(a) of the Government Code provides that "a judge assigned by the presiding judge to a court in the same administrative region, or to a court in another administrative region at the request of the presiding judge of the other administrative region, shall serve in the court or administrative region to which he is assigned." The plain language of Section 74.058(a) expressly identifies the presiding administrative judge of the region in which the assigned judge ordinarily sits as the assigner.

***10** The majority strays further afield in resorting to canons of interpretation. The general-versus-specific canon is well established. *E.g.*, *Sims v. State*, 569 S.W.3d 634, 642 (Tex. Crim. App. 2019) (applying canon to statutes). But courts ordinarily apply this canon to resolve irreconcilable conflicts between statutory or contractual provisions. It is not self-evident that the canon can be applied to inconsistent orders entered by different judges. Nor is it apparent that the inconsistency at issue—the duration of Gallagher's assignment—is one susceptible to characterization as a conflict between a general provision and a specific one. In its proper application, courts apply the general-versus-specific canon so that a specific provision operates as an exception to the general one in a particular situation, not to negate the general provision entirely. *Id.* The majority's application of the canon, however, interprets one of the two orders, the one it characterizes as general, out of existence.

At any rate, assuming inconsistent orders entered by different judges can be reconciled by resort to canons of interpretation in general, the majority's attempt to do so in this particular instance is fatally flawed because its reconciliation rests on an erroneous interpretation of the statute under which the inconsistent orders were entered. The majority erroneously posits that the presiding judge of the First Region could have assigned Gallagher, notwithstanding the unambiguous contrary language of Sections 74.056(b) and 74.058(a). But given that one of the assignment orders is valid and the other is not, there is no need to reconcile the two orders.

In sum, the majority is correct that the narrower assignment order of the presiding judge of the Eighth Region prevails over the broader one entered by the presiding judge of the First Region. But this is so because the presiding judge of the First Region did not have any authority to assign Gallagher to sit in Collin County and hear these cases under the plain language of the applicable statutes, not because of the ostensible overarching purpose of the statutory scheme or because of the ostensible need to reconcile the two orders through canons of interpretation.

Second Prong of the Majority's Holding

Apart from the statutory assignment of judges to other districts and counties, our Constitution provides that "District Judges may exchange districts, or hold courts for each other when they may deem it expedient." TEX. CONST. art V, § 11. Under this constitutional provision, district judges have broad discretion to exchange benches or hold courts. *Floyd v. State*, 488 S.W.2d 830, 832 (Tex. Crim. App. 1972). They may exchange benches or hold courts for each other without "a formal order or entry on the record of the reasons." *Id.* There are no geographical restrictions on this provision. *Sanchez v. State*, 365 S.W.3d 681, 685 (Tex. Crim. App. 2012).

The majority holds that Article V, Section 11 does not apply for two reasons. First, it says the record shows that Gallagher was statutorily assigned to these cases, not that he exchanged benches with another judge under the constitutional provision, and that his statutory assignment had expired. Second, the majority says an expired statutory assignment cannot be "automatically converted" into a constitutional exchange of benches because doing so "would create confusion about the scope of assignment orders and undermine the effectiveness of the Court Administration Act."

I do not dispute that Gallagher was statutorily assigned to preside over these cases or that his statutory assignment had expired when he transferred them to Harris County. But Article V, Section 11's standard—expediency—is very broad. Under this provision, an exchange of benches is expedient whenever it is "convenient and practical." NEW OXFORD AMERICAN DICTIONARY 609 (3d ed. 2010). One of our sister courts has held that an assignment order reflected that the judges involved had deemed it expedient for the assigned judge to preside over a case as contemplated by Article V, Section 11, notwithstanding the fact that the

order referenced neither the constitutional provision nor its expediency standard. *Permian Corp. v. Pickett*, 620 S.W.2d 878, 880–81 (Tex. App.—El Paso 1981, writ ref'd n.r.e.). Similarly, the assignment order before us—though expired—effectively reflects that the judges involved deemed it expedient for Gallagher to preside over these cases. This is enough to save Gallagher's transfer order, particularly given that Paxton did not object to Gallagher's continued involvement in the cases until after the order had been entered and more than five months after Gallagher's statutory assignment had expired. [1]

***11** I acknowledge that applying Article V, Section 11 under circumstances like these could result in confusion about the scope of an assignment order in a given case. But we can achieve certainty only at the expense of flexibility. Some potential for confusion is unavoidable in a flexible system like ours, which includes multiple sources of authority for the assignment of judges and exchange of benches under a variety of circumstances. *See* TEX. CONST. art. V, § 11; TEX. GOV'T CODE §§ 24.003, 74.056–.057, 74.121; TEX. R. CIV. P. 330(e). Those who ratified the broad language of Article V, Section 11 necessarily weighed the trade-off between certainty and flexibility and struck the balance in favor of the latter by placing no limitations other than expediency on the provision. Our safeguard against any resulting potential for confusion lies in restraint, collegiality, communication, and cooperation on the part of judges. *Davis v. Crist Indus.*, 98 S.W.3d 338, 343 n.19 (Tex. App.—Fort Worth 2003, pet. denied). In this case, the application of Article V, Section 11 could not cause any more confusion than has already resulted from the entry of conflicting assignment orders by the presiding judges of two administrative regions.

The majority cites our decision in *Roberts v. Ernst* as support for its position that we cannot treat Gallagher's assignment as a constitutional exchange of benches. 668 S.W.2d 843 (Tex. App.—Houston [1st Dist.] 1984, orig. proceeding). But *Roberts* was decided on very different facts. In that case, the presiding judge of the administrative region assigned a district judge to another court for one week as well as the period of time afterward necessary to complete any trial begun and to hear any new-trial motions. *Id.* at 844. The assigned district judge tried a case during this period but granted the plaintiffs a new trial afterward on the ground that the damages awarded by the jury were inadequate. *Id.* Months later, as the case approached retrial, the presiding judge of the administrative region assigned a second district judge to the court to address pretrial motions. *Id.* at 844–45. This second judge heard these motions and granted a continuance sought by the defendants. *Id.* at 845. The district judge who originally tried the case apparently was in the courtroom when the second judge did so and disapproved of the second judge's ruling. *See id.* Almost within the hour, the original judge—whose assignment to the court had long ago expired—vacated the continuance entered by the second judge and then granted the plaintiffs a change of venue! *Id.* In a later mandamus proceeding, the plaintiffs tried to defend this turn of events on the ground that the first district judge continued to properly exercise authority over the case under Article V, Section 11. *Id.* at 846. On these remarkable facts, which involved one district judge whose assignment had expired undoing the order of another judge who had since been assigned to the case, we quite sensibly rejected the plaintiffs' argument on the ground that the record contained no evidence that the two judges had agreed to an exchange of benches. *Id.*

In other words, *Roberts* stands for the commonsense principle that an exchange of benches cannot exist, or be implied from an expired assignment, when the facts definitively show that one judge is interfering with the rightful authority of another. This principle has no applicability here, given that Gallagher was the lone judge presiding over these cases when he transferred them to Harris County.

Though the order assigning Gallagher to hear these cases had expired, it implicitly reflects a judgment by the assigning presiding judge that Gallagher's presence is expedient. *See Permian Corp.*, 620 S.W.2d at 880–81. Likewise, the second assignment order, though invalid, implicitly reflects a judgment on the part of the requesting presiding judge that Judge Gallagher's presence is expedient. *See id.* When, as here, a district judge continues to hear assigned cases after the expiration of his assignment without protest from the assigning or receiving presiding judges, and his continued hearing of the cases does not bring him into conflict with the judge who ordinarily presides over the court, Article V, Section 11 fills the gap, enabling the district judge to carry on with the lapsed assignment until circumstances arise that show his presence is no longer welcome. Thus, Gallagher's order transferring these cases from Collin County to Harris

County is not void, and the Harris County district court erred in vacating the transfer order on this basis.

***12** As for the majority's contention that applying Article V, Section 11 in this instance would undermine the Court Administration Act, the majority puts the cart before the horse. Our Constitution is supreme. If its provisions undermine a statute, it is the statute that must give way. Courts have repeatedly said so with respect to Article V, Section 11 in particular. *See Moore v. Davis*, 32 S.W.2d 181, 182 (Tex. Comm'n App. 1930) (provision cannot be abridged by statute); *Reynolds v. City of Alice*, 150 S.W.2d 455, 458–60 (Tex. App.—El Paso 1940, no writ) (provision's scope cannot be limited by statute); *Ferguson v. Chapman*, 94 S.W.2d 593, 599 (Tex. App.—Eastland 1936, writ dism'd) (provision cannot be abridged by statute); *Connellee v. Blanton*, 163 S.W. 404, 406 (Tex. App.—Fort Worth 1913, writ ref'd) (provision could not be interpreted as having been contravened by statute). But given that neither the presiding administrative judges nor the district judge who ordinarily presides over the Collin County court objected to Judge Gallagher continuing to hear these cases, any ostensible conflict with the Court Administration Act is chimerical.

For these reasons, I think the majority's refusal to apply Article V, Section 11 is flawed. Gallagher's continued involvement in these cases after the expiration of his assignment was expedient and therefore authorized by our Constitution.

Conclusion

I would grant the State's petition for the writ of mandamus because Article V, Section 11 of the Texas Constitution authorized Judge Gallagher to transfer these cases to Harris County after his statutory assignment expired. Thus, I respectfully dissent from the majority's denial of the State's petition for the writ of mandamus. That said, at this point almost six years has elapsed since Paxton was indicted. Whichever district court ultimately receives these cases should move them to trial as expeditiously as possible. Further delay is anything but expedient.

All Citations

--- S.W.3d ----, 2021 WL 2149332

Footnotes

1 The underlying cases are *The State of Texas v. Warren Kenneth Paxton, Jr.*, Cause Nos. 1555100, 1555101, and 1555102, in the 185th District Court of Harris County, Texas, the Honorable Jason Luong presiding.

2 *See In re Blevins*, 480 S.W.3d 542, 543–44 (Tex. 2013).

3 *See* TEX. GOV'T CODE ANN. § 24.560 ("The 416th Judicial District is composed of Collin County."); *id.* § 74.042(b) (including Collin County in First Administrative Judicial Region).

4 *See id.* § 24.541(a) ("The 396th Judicial District is composed of Tarrant County."); *id.* § 74.042(i) (including Tarrant County in Eighth Administrative Judicial Region).

5 2016 was a leap year. The email correspondence between the Presiding Judges' staff in the mandamus record cites December 31, 2016 as the end date for the appointment. Calculating the end date according to the Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure, it is January 2, 2017. *See* TEX. R. CIV. P. 4; TEX. R. APP. P. 4.1.

6 In the mandamus petition, Relator asserts that Judge Johnson "failed to discharge his ministerial duty to rule on Relator's motion to issue a new payment order for payment of attorney's fees and on Nicole DeBorde's unopposed motion to withdraw as an attorney pro tem within a reasonable time."

7 *See In re Blevins*, 480 S.W.3d at 543–44.

8 Respondent's alternative conclusion that the trial court lacked jurisdiction to reconsider Judge Johnson's June 25, 2020 order because its plenary power had expired ignores our July 7, 2020 order staying enforcement of the June 25, 2020 order. Our emergency-stay order, which was issued before the expiration of the trial court's thirty-day period of plenary power, preserved the status quo and remains "effective until the case is

finally decided." TEX. R. APP. P. 52.10(b). As a result, we decide the issue of whether Respondent erred in vacating Judge Gallagher's change of venue order and returning the underlying cases to Collin County.

9 *See* TEX. CONST. art. V, § 11 ("[T]he District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law."); TEX. GOV'T CODE ANN. § 74.121(a) ("The judges of those courts within a county may exchange benches and courtrooms with each other so that if one is absent, disabled, or disqualified, the other may hold court for him without the necessity of transferring the case.").

10 Apart from the expiration of Judge Gallagher's assignment, Paxton has not asserted that Judge Gallagher was unqualified in any way.

11 The chief justice of the Supreme Court of Texas also has the authority to assign judges of "one or more administrative regions for service in other judicial administrative regions" when the chief justice "considers the assignment necessary to the prompt and efficient administration of justice." TEX. GOV'T CODE ANN. § 74.057(a). An assignment by the chief justice under that provision requires the assigned judge to perform the same duties and functions that the judge would perform if assigned by the presiding judge. *Id.* § 74.057(b).

12 The Texas Government Code codifies this provision in two places. *See* TEX. GOV'T CODE ANN. § 24.003(b)(4) (district judge may "temporarily exchange benches with the judge of another district court in the county"); *id.* § 74.121 (declaring "[t]he judges of those courts within a county may exchange benches and courtrooms with each other so that if one is absent, disabled, or disqualified, the other may hold court for him without the necessity of transferring the case"). These provisions, which by their terms, are limited to intra-county exchange of benches, do not affect our disposition of the petition for writ of mandamus.

13 Because of our disposition of the State's first issue, we do not reach its second and third issues requesting that we compel the trial court to rule on certain motions. *See* TEX. R. APP. P. 47.1.

1 At the December 17, 2019 hearing on Paxton's motion to set aside Gallagher's transfer order, Paxton's counsel represented that he objected to the transfer order as soon as he discovered that Gallagher's assignment had expired. But counsel's representation was not based on personal knowledge. After counsel for the State argued that there was no evidence as to when Paxton's counsel discovered that Gallagher's assignment had expired, Paxton's counsel explained: "I'm telling you as an officer of the court standing here in good faith we found out in May. If you want to take testimony on that, I'm happy to have Phil, who I think actually discovered this, testify." Because Paxton's counsel did not have firsthand knowledge of the matter (and Phil did not testify), the trial court could not rely on his representations as evidence. *Gonzales v. State*, 435 S.W.3d 801, 811–12 (Tex. Crim. App. 2014). Nor can we. There is no evidence in the record as to how or when Paxton's counsel discovered that Gallagher's assignment had expired.

End of Document

APPENDIX TAB 2

2017 WL 2334242
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Dallas.

IN RE Warren Kenneth PAXTON, Jr., Relator

No. 05-17-00507-CV, No. 05-17-00508-CV, No. 05-17-00509-CV
|
Opinion Filed May 30, 2017

Synopsis
Background: Defendant in underlying criminal actions filed petitions for writ of mandamus vacating all orders by the 416th Judicial District Court, Collin County, Nos. 416-81913-2015, 416-82148-2015, and 416-82149-2015, George Gallagher, J., after order transferring venue and writ of prohibition prohibiting the 416th Judicial District Court from taking any further action in the underlying cases.

Holdings: The Court of Appeals, Fillmore, J., held that:

jurisdiction automatically vested in Harris County district courts, and Collin County district courts were divested of jurisdiction, when judge in Collin County signed transfer order;

statute required consent of all parties, including defendant, was required for transferring judge to continue to preside over case following transfer; and

application of statute requiring consent of all parties for transferring judge to continue to preside over case to appointed judge did not violate Separation of Powers Clause.

Writ of mandamus conditionally granted.

Original Proceeding from the 416th Judicial District Court, Collin County, Texas, Trial Court Cause Nos. 416-81913-2015, 416-82148-2015, and 416-82149-2015, George William Gallagher, J.

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Brian W. Wice, Attorney at Law, Nicole W. DeBorde, Kent A. Schaffer, Bires Schaffer & DeBorde, Houston, TX, for Real party in interest THE STATE OF TEXAS.
Before Justices Bridges, Fillmore, and Schenck

OPINION

Opinion by Justice Fillmore

***1** Before the Court is relator's May 15, 2017 petition for writ of mandamus and petition for writ of prohibition. This original proceeding arises from an April 11, 2017 order granting the State's motion to transfer venue of the underlying cases from Collin to Harris County pursuant to article 31.02 of the Texas Code of Criminal Procedure. Relator complains that the respondent, the Honorable George Gallagher, continues to preside over the underlying cases without relator's consent and has interfered with the Collin County District Clerk's duty to transfer the original papers of the underlying cases to Harris County pursuant to article 31.05 of the code of criminal procedure.

Relator asks this Court to issue a writ of mandamus vacating all orders signed by respondent following the April 11, 2017 order transferring venue. Relator also asks this Court to issue a writ of prohibition against respondent prohibiting him from taking any further action in the underlying cases. For the following reasons, we agree with relator that respondent's orders signed after the transfer order are void and conditionally grant the petition

for writ of mandamus.

Background

Respondent was assigned to the 416th Judicial District Court of Collin County, Texas to preside over the criminal cases styled *The State of Texas v. Warren Kenneth Paxton, Jr.,* Cause Nos. 416-81913-2015, 416-82148-2015, and 416-82149-2015. Almost two years later, on April 11, 2017, respondent signed an order granting the State's motion to transfer venue to Harris County pursuant to article 31.02 of the code of criminal procedure.[1] The same day, relator filed a "Motion for Court's Compliance with Texas Code of Criminal Procedure Articles 31.05 and 31.09" in which relator advised respondent that relator did not consent under article 31.09 to respondent presiding over the cases in Harris County.[2] Relator's motion also requested that respondent order the Collin County District Clerk to send a certified copy of the case files to the Harris County District Clerk so that a new judge could be assigned.

1 Article 31.02 governs a State's motion to transfer venue in a criminal case. See TEX. CODE CRIM. PROC. ANN. art. 31.02 (West 2006).

2 Article 31.05 sets out the clerk's duties on change of venue and article 31.09 addresses the circumstances under which a judge ordering a change in venue may continue to preside over the case and utilize services of the court reporter, the court coordinator, and the clerk of the court of original venue. See TEX. CODE CRIM. PROC. ANN. arts. 31.05 (West 2006), 31.09 (West Supp. 2016).

The next day, April 12, 2017, relator supplemented his motion indicating that he did not seek entry of any order by respondent and only intended to notify respondent that relator expected statutory compliance with the code of criminal procedure. The same day, respondent entered a scheduling order and notified the parties via e-mail that he intended to conduct jury selection and trial beginning September 11, 2017 in Harris County. Five days later, respondent, via e-mail, invited the parties to meet with him that week in Houston to tour the courthouse and view the facilities in advance of trial. Two weeks later, relator sent a letter to the Collin County District Clerk requesting that she transmit the case files to Harris County as required by article 31.05 of the code of criminal procedure. The Clerk responded that she does not "plan to transmit the case papers to Harris County at this time" because it is her "understanding that [respondent] continues to preside over these cases under their current Collin County cause numbers and that he continues to use the services of the Collin County District Clerk's office as the custodian of the records" in these cases. The district clerk also indicated that if she complied with relator's request to send the case files to Harris County, she would be "perhaps running afoul of the directions, expressed and/or implicit, of the Presiding Judge regarding venue and my office's ongoing role."

Relief Requested

*2 Relator now seeks relief from this Court. He contends respondent may not continue to preside over the cases in Harris County because a judge that orders a change in venue in a criminal case may continue to preside over the case after the transfer and continue to use the transferor court's administrative resources only if the State, the defendant, and the defendant's counsel consent. *See* TEX. CODE CRIM. PROC. art 31.09 (West Supp. 2016). According to relator, because he has not consented to respondent continuing to preside over the case, respondent no longer has authority to act and all actions taken after the April 11, 2017 transfer order are void as a matter of law. Relator asks this Court to grant a writ of mandamus vacating respondent's April 12, 2017 scheduling order and all other orders issued by respondent after the April 11, 2017 transfer order. Relator further requests the Court to issue a writ of prohibition to prevent respondent from taking any further actions in the cases.

Analysis

This Court has jurisdiction to issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court. TEX. GOV'T CODE ANN. § 22.221(a) (West 2004). We also have jurisdiction to issue all writs of mandamus against a judge of a district court in our district. TEX. GOV'T CODE ANN. § 22.221(b)(1). We have writ jurisdiction over district courts in Collin County but not Harris County. *See* TEX. GOV'T CODE ANN. § 22.201(f) (West Supp. 2016).

To establish a right to mandamus relief in a criminal case, the relator must show the trial court violated a ministerial duty and there is no adequate remedy at law. *In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013) (orig. proceeding). The ministerial act requirement is satisfied if the relator can show a clear right to the relief sought. *Id.* "A clear right to relief is shown when the facts and circumstances dictate but one rational decision 'under unequivocal, well-settled (i.e., from extant statutory, constitutional, or case law sources), and clearly controlling legal principles.' " *Id.* When a trial court acts beyond the scope of its lawful authority, a clear right to relief exists. *See, e.g., State ex rel. Watkins v. Creuzot*, 352 S.W.3d 493, 506 (Tex. Crim. App. 2011) (orig. proceeding) (holding State entitled to mandamus relief because there was no basis under Texas law to conduct pretrial evidentiary hearing to determine adequacy of mitigation case in capital-murder proceeding); *see also State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 919 (Tex. Crim. App. 2011) (orig. proceeding) (holding State entitled to mandamus relief because there was no state law or procedure permitting pretrial hearing and ruling that would deprive relator of the opportunity to try its capital case and seek the death penalty). An issue of first impression can qualify for mandamus relief when the principle of law is clearly established. *Weeks*, 391 S.W.3d at 122.

When a court signs an order changing venue, jurisdiction immediately and automatically vests in the transferee court. *Williams v. State*, 145 Tex.Crim. 536, 540–41, 170 S.W.2d 482, 485–86 (1943) ("A change of venue not only absolutely divests the court from which the cause was removed of jurisdiction, but it also clothes the court to which removal is had with the same jurisdiction that reposed prior to the change in the court of original venue."); *Webb v. State*, 133 Tex.Crim. 32, 36, 106 S.W.2d 683, 685 (1937) ("The order changing the venue in this case from Sabine to Newton county conferred jurisdiction upon the district court of the latter county. The court's order changed the venue; the certified copy thereof was merely evidence of the change of venue."); *see also In re Gibbs*, No. 06-15-00002-CV, 2015 WL 400468, at *2 (Tex. App.—Texarkana Jan. 30, 2015, orig. proceeding) (mem. op.) ("The failure to transfer the physical file from Fannin County to Tarrant County affects neither the finality of the transfer order nor the transferring court's plenary jurisdiction.").

***3** Here, respondent signed the order transferring the case to Harris County on April 11, 2017. As a result of that order, jurisdiction over the cases vested in the Harris County district courts, and the Collin County district court was divested of jurisdiction over the cases. The failure of the Collin County District Clerk to transfer the case files from Collin County to Harris County did not affect that jurisdictional change. *See, e.g., Gibbs*, 2015 WL 400468 at *2. The Harris County district courts have jurisdiction over all further proceedings in these cases as a matter of law.

This conclusion does not end our inquiry, however, because respondent has taken actions after transferring venue that may be void. The issuance of a void order is an abuse of discretion. *In re Gibbs*, 2015 WL 400468, at *1 (citing *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (per curiam) (orig. proceeding) and *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998) (per curiam) (orig. proceeding)). "Mandamus is proper if a trial court issues an order beyond its jurisdiction." *In re Sw. Bell Tel. Co.*, 35 S.W.3d at 605. Although appellate courts do not have jurisdiction to address the merits of appeals from void orders or judgments, they do have jurisdiction "to determine that the order or judgment underlying the appeal is void and make appropriate orders based on that determination." *Freedom Commc'ns., Inc. v. Coronado*, 372 S.W.3d 621, 623–24 (Tex. 2012); *Bossley v. Dallas Cty. Mental Health & Mental Retardation*, No. 05-99-00081-CV, 1999 WL 993901, at *3 (Tex. App.—Dallas Nov. 2, 1999, no pet.) (mem. op., not designated for publication) ("When a party appeals from a void order and the appellate court lacks jurisdiction to consider the appeal, the proper procedure is for the appellate court to declare the order to be void and dismiss the appeal for lack of jurisdiction."). Similarly, when, as here, a party seeks mandamus relief from a trial court's void orders, an appellate court may conditionally grant the writ and direct the trial court to set aside the void orders and take other steps necessary to cure any problems caused by the void orders. *See In re Gibbs*, 2015 WL 400468, at *3 (conditionally granting writ and directing trial court to set aside void order and to transfer the physical file in the case to the transferee court).

A judgment is void when it is apparent from the record that "the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court." *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990) (orig. proceeding) (per curiam).

Relator argues that any actions taken by respondent after respondent signed the transfer order are void because the Harris County district courts have jurisdiction over the cases and, absent relator's consent, respondent may not preside over the cases in Harris County. We have already determined that the signing of the transfer order vested jurisdiction in the Harris County district courts and

divested the Collin County district court of jurisdiction over the cases. Relying on article 31.09 of the Texas Code of Criminal Procedure, relator maintains that the transfer also deprives respondent of any authority to act in the cases. Article 31.09 provides as follows:

> (a) If a change of venue in a criminal case is ordered under this chapter, the judge ordering the change of venue may, with the written consent of the prosecuting attorney, the defense attorney, and the defendant, maintain the original case number on its own docket, preside over the case, and use the services of the court reporter, the court coordinator, and the clerk of the court of original venue. The court shall use the courtroom facilities and any other services or facilities of the district or county to which venue is changed. A jury, if required, must consist of residents of the district or county to which venue is changed.

***4** TEX. CRIM. PROC. CODE Ann. art. 31.09(a).

Jurisdiction over the cases vested immediately in the Harris County district courts when respondent signed the transfer order. The Texas Constitution does not allow the 416th Judicial District Court to sit outside of the Collin County seat, McKinney, absent express statutory authority. TEX. CONST. art. V, § 7. The only authority by which this may occur is article 31.09, which requires consent of the parties. Thus, absent effective application of article 31.09, respondent may not continue to preside over the cases or utilize the services of the court reporter, court coordinator, or clerk of the court of original venue. Relator has unequivocally stated that he did not consent to respondent continuing to preside over the cases or otherwise acting in accordance with article 31.09, and no written consent appears in our record. Accordingly, under the plain language of the statute, respondent is without authority to continue to preside over the cases and is also without authority to issue orders or directives maintaining the case files in Collin County. Consequently, all orders issued by respondent after he signed the April 11, 2017 transfer order are void.

In reaching this conclusion, we necessarily reject the State's suggestion that applying the plain language of article 31.09 to this case will lead to an absurd result. *See Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (explaining courts should not apply statutory language literally where plain language would lead to absurd consequences Legislature could not possibly have intended, thus respecting lawmaking powers of the legislative branch). The State does not articulate why following the plain language of article 31.09 in this case would lead to an absurd result, nor can we envision why it would. Moreover, prior to the 1995 enactment of article 31.09, no statute allowed a presiding judge to maintain a case on his docket and continue to use his court's administrative resources, after the case had been transferred to another venue. *See Fain v. State*, 986 S.W.2d 666, 675–76, n.13 (Tex. App—Austin 1998, pet. ref'd). Article 31.09 provides a limited exception to the long-standing rule that a judge does not follow the transferred case. The judge may continue to preside over the case only with the agreement of the parties.

We likewise reject the State's argument that article 31.09 does not apply to respondent because he was appointed to preside over these cases by the regional administrative judge under section 74.056(b) of the government code. The State failed to provide authority for this proposition and we have found none.[3] To be sure, respondent was appointed to "the 416th [Judicial] District Court of Collin County" to preside over these cases. But the Legislature has made no distinction in article 31.09 between elected and appointed judges, and we will not create one by judicial fiat. *See Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011) (the objective in statutory construction is to give effect to the Legislature's intent by looking first to the statute's literal text, reading words and phrases in context and construing them according to the rules of grammar and usage, and presuming "that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible") (internal citations omitted); *see also Merritt v. State*, 252 S.W.3d 757, 760 (Tex. App.—Texarkana 2008, no pet.) ("We will assume that the Legislature used precisely the words that it intended to use and apply them as written.").

[3] We note that in a somewhat analogous situation, the Corpus Christi Court of Appeals has held that the appointment of a judge to hear a case following recusal does not shield the case from a subsequent transfer order of the local administrative judge:

> [T]he Presiding Judge's appointment of a new judge to hear the case following recusal does not in itself create a proprietary right to have that particular judge and court decide the case for its duration. We hold that, as with the initial assignment of the lawsuit to a judge and court, any subsequent appointment is

> subject to the lawful transfer orders of the local Administrative Judge.
>
> *In re PG & E Reata Energy, L.P.*, 4 S.W.3d 897, 901 (Tex. App.—Corpus Christi 1999, orig. proceeding).

***5** The State's arguments that applying article 31.09 to an appointed judge somehow thwarts the objective of section 74.056(b) of the government code and results in a violation of the separation of powers clause[4] are equally unavailing. Section 74.056(b) generally allows the presiding judge of one administrative region to ask the presiding judge of another administrative region to furnish judges to aid in the disposition of litigation pending in a county in the administrative region of the presiding judge who makes the request. TEX. GOV'T CODE ANN. § 74.056(b) (West 2013). The State does not explain how the general language in section 74.056(b) permitting appointment of judges between administrative regions somehow supplants the specific language in article 31.09(a) requiring the parties' consent for a judge to continue to preside over a case he has transferred to a different venue. Similarly, the State's complaint that application of article 31.09 to an appointed judge violates the separation of powers clause and "affords the Legislature the authority to provide [relator] with the unchecked authority to remove [respondent] from presiding" and "encroaches on [the regional administrative judge's] exclusive authority ... to appoint [respondent] to Relator's cases ... and her sole authority to remove him" is also misplaced. Respondent was assigned to a particular court to preside over particular cases pending in that court. By seeking a change in venue, the State invoked Chapter 31 of the code of criminal procedure and the various requirements of that chapter of the Code. By transferring the case on the State's motion, respondent, not relator, triggered the requirements of articles 31.05 and 31.09 and divested the 416th Judicial District Court of Collin County, Texas of jurisdiction over the cases. Following the signing of the transfer order, the only action respondent could take was to vacate the transfer order during the period of the court's plenary power. Because he did not do so, respondent's authority to act expired when the venue order became final. Consequently, respondent's appointment also terminated at that time.

[4] TEX. CONST. art. II, § 1

A trial court entering a void order has a ministerial duty to vacate the order. *State ex rel. Thomas v. Banner*, 724 S.W.2d 81, 85 (Tex. Crim. App. 1987) (orig. proceeding) ("Absent proper jurisdiction, it was the trial court's ministerial duty to vacate the orders."). Mandamus is the proper relief to set aside an improper order. *Id.* Because we conclude that the trial court lacked authority to issue orders or directives after signing the transfer order, all orders and directives issued after he signed the April 11, 2017 transfer order are void and should be vacated. *See In re Melton*, 478 S.W.3d 153, 157 (Tex. App.—Texarkana 2015, no pet.) (conditionally granting writ and directing trial court to vacate void nunc pro tunc judgments); *In re Gibbs*, 2015 WL 400468, at *3 (conditionally granting writ, directing the court to set aside void order, and directing the court to transfer the physical file in this case to the transferee court).

Accordingly, we conditionally grant the petition for writ of mandamus and lift our May 16, 2017 stay order. We direct respondent to vacate the April 12, 2017 scheduling order, vacate any other orders issued by respondent after the April 11, 2017 transfer order, withdraw any directives made, explicit or implied, that preclude the Collin County District Clerk from performing her mandatory duty to transfer the case files to the Harris County district courts under article 31.05 of the Texas Code of Criminal Procedure, and direct the Collin County District Clerk to transfer the case files to the transferee district court in Harris County. The writ of mandamus will issue only if respondent fails to act in accordance with this opinion.

We do not have jurisdiction to issue the requested writ of prohibition because there is no appeal pending and a writ of prohibition is not necessary to protect our jurisdiction. *See Bayoud v. N. Cent. Inv. Corp. Through Bayoud*, 751 S.W.2d 525, 529 (Tex. App.—Dallas 1988, writ denied) ("A court of appeals does not have jurisdiction, absent a pending appeal, to issue a writ of prohibition requiring that a trial court refrain from performing a future act."); *see also In re Yates*, 193 S.W.3d 151, 152 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (courts of appeals have jurisdiction to issue writs other than writs of mandamus only if the writ is "necessary to enforce the jurisdiction of the court.") (citing TEX. GOV'T CODE ANN. § 22.221(a) (Vernon 2004)). Accordingly, we dismiss the petition for writ of prohibition for want of jurisdiction.

All Citations

--- S.W.3d ----, 2017 WL 2334242

End of Document

APPENDIX TAB 3

2021 WL 4095254
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Houston (1st Dist.).

IN RE the STATE of Texas EX REL. Brian W. WICE, Relator

NO. 01-20-00477-CR, NO. 01-20-00478-CR, NO. 01-20-00479-CR

|

Opinion issued September 9, 2021

Original Proceeding on Petition for Writ of Mandamus

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Before the court en banc.

Opinion

***1** Reconsideration en banc denied.

En banc court consists of Chief Justice Radack and Justices Kelly, Goodman, Hightower, Countiss, Landau, Rivas-Molloy, and Guerra. Justice Farris not participating.

Goodman, J., dissenting from the denial of en banc reconsideration for reasons stated in his concurring and dissenting opinion.

Guerra, J., dissenting from the denial of en banc reconsideration with separate opinion.

OPINION DISSENTING FROM THE DENIAL OF EN BANC RECONSIDERATION

Amparo Guerra, Justice

In this original proceeding, the State requested mandamus relief from an order of the Harris County District Court vacating a previous change of venue order and returning the underlying cases to Collin County. The majority opinion concludes that the district judge who transferred these cases from Collin County to Harris County—the Honorable George Gallagher—lacked authority to do so because he presided over the cases under an order of assignment that expired before he signed the change of venue order. Because this conclusion is erroneous, it should be revisited, and therefore, I respectfully dissent from the denial of en banc reconsideration.

Admittedly, the State has done little to advance an argument that Judge Gallagher's assignment did not expire before he transferred these cases to Harris County, beyond remarking in this Court and below that Judge Gallagher's authority had only "allegedly" lapsed. The State instead emphasized its arguments that (1) the real party in interest is precluded from challenging Judge Gallagher's authority under the law-of-the-case doctrine and rules for preservation of error and (2) Judge Gallagher was authorized to sit without an appointment order under the Texas constitutional provision permitting an exchange of benches. *See* TEX. CONST. art. V, § 11 ("[T]he District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law."). The decision to vacate Judge Gallagher's change of venue order and return these cases to Collin County presents an important question of law interpreting unambiguous assignment orders and raises concerns about the effective administration of the courts. *See* *Icon Benefit Admins. II, L.P. v. Mullin*, 405 S.W.3d 257, 264 (Tex. App.—Dallas 2013, orig. proceeding) (courts construe orders that can be given "a certain or definite legal meaning or interpretation" as matter of law). It is incumbent on this Court to correctly interpret the assignment orders and afford them "the literal meaning of the language used," even if the parties have not precisely articulated that meaning. *See* *id.* This has not been achieved in the majority opinion.

Judge Gallagher is an elected judge in the Eighth Administrative Judicial Region ("Eighth Region"). At the request of the Presiding Judge of the First Administrative Judicial Region ("First Region"), where these cases were pending in Collin County, the Presiding Judge of the Eighth Region assigned Judge Gallagher to the First Region on July 28, 2015 ("July 28 assignment order"). *See* TEX. GOV'T CODE § 74.056(b). Under the July 28 assignment order, Judge Gallagher was assigned to the First Region "*for reassignment by the Presiding Judge thereof* ... for a period of 157 days, beginning July 28th, 2015." (Emphasis added.) The July 28 assignment order stated that if Judge Gallagher began "a trial on the merits during the period of this assignment, the assignment continue[d] in such cases until plenary jurisdiction ha[d] expired or the undersigned Presiding Judge [of the Eighth Region] terminated this assignment in writing, whichever occurs first."

***2** The next day, the First Region's Presiding Judge specifically assigned Judge Gallagher to the underlying cases ("July 29 assignment order"). In pertinent part, the July 29 assignment order provided:

> This assignment is for the cause(s) and style(s) as stated in the conditions of assignment from this date until plenary power has expired or the undersigned Presiding Judge has terminated this assignment in writing, whichever occurs first.
>
> CONDITION(S) OF ASSIGNMENT
>
> NOS. 416-81913-2015, 416-81914-2015, 416-81915-2015; State of Texas [v.] Warren Kenneth Paxton, Jr.

Then, on December 18, as referenced in the majority opinion, the First Region's Presiding Judge signed an Order Extending Assignment by Presiding Judge ("December 18 assignment order"). Although the majority opinion characterizes this order as "extending Judge Gallagher's assignment to the underlying cases," the order did not reference the cause numbers set out in the "CONDITION(S) OF ASSIGNMENT" in the July 29 assignment order. Rather, the December 18 assignment order defined its subject matter as:

> IN THE MATTER OF THE COLLIN COUNTY GRAND JURY 296TH JUDICIAL DISTRICT COURT

The December 18 assignment order provided:

> By order dated October 23, 2015, the [First Region's Presiding Judge] assigned the Honorable George Gallagher, Active Judge of the 396th Judicial District Court, to preside in the *above matter* in which the Grand Jury requested appointment of a special prosecutor. The Grand Jury has requested an extension of its term for a period of 90 days to allow completion of its investigation, which has been granted by order dated December 15, 2015. Accordingly, the October 23, 2015 order assigning the Honorable George Gallagher to this matter should be extended to allow completion of the Grand Jury's investigation and any resulting actions required by the judge, including receipt of indictments, if any, from the Grand Jury.
>
> IT IS THEREFORE ORDERED that the assignment of the Honorable Gallagher is extended from October 23, 2015 until such time as necessary to complete any actions required by Judge Gallagher as the presiding judge in the *above matter*, unless the assignment is earlier terminated by the Presiding Judge of the [First Region].

(Emphasis added.)

Three days later, on December 21, the Eighth Region's Presiding Judge signed another general order of assignment ("December 21 assignment order"), which assigned Judge Gallagher "to the [First Region] for reassignment by the Presiding Judge thereof ... for a period of 366 days, beginning January 1, 2016." The December 21 assignment order did not reference the underlying cases to which Judge Gallagher had been assigned by the First Region's Presiding Judge five months earlier.

The majority opinion perceives a conflict between the assignment orders as to the duration and scope of Judge Gallagher's assignment. [1] The majority opinion employs the general-versus-specific canon of construction to resolve the perceived conflict, even though that canon was not urged by the parties. *See* *Sims v. State*, 569 S.W.3d 634, 642 (Tex. Crim. App. 2019) ("The 'general versus the specific' canon of statutory construction stands for the proposition that '[i]f there is a conflict between a general provision and a specific provision, the specific provision prevails ....' as an exception to the general provision." (quoting ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183 (2012)); *see*

also TEX. GOV'T CODE § 311.026. The majority opinion then errs by giving greater effect to the general December 21 assignment order while ignoring the plain language of the specific July 29 assignment order that gave Judge Gallagher authority to preside over the underlying cases "until plenary power ... expired or the [First Region's] Presiding Judge ... terminated th[e] assignment in writing," neither of which happened before Judge Gallagher signed the change of venue order. Specifically, the majority opinion construes the 366-day period set out in the general December 21 assignment order as "defining the outer limit of Judge Gallagher's assignment" to the underlying cases, despite no reference to these cases in that order. And, by applying the general-versus-specific canon, the majority opinion concludes the assignment orders "can be reasonably read to agree that Judge Gallagher's assignment to ... Collin County [and specifically to the underlying cases] was to end on January 2, 2017."

***3** There is no need to apply the general-versus-specific canon here because there is no conflict between the relevant assignment orders—the July 28 assignment order and the July 29 assignment order—as to the duration and scope of Judge Gallagher's assignment. But even if that canon applied, it would compel the opposite conclusion.

As our sister court of appeals in Houston explained, visiting judges generally are assigned either for a period of time or to a particular case. *See In re Republic Parking Sys., Inc.*, 60 S.W.3d 877, 879 (Tex. App.—Houston [14th Dist.] 2001, orig. proceeding) (addressing nature of general versus specific assignments). A "general assignment to a court for a period of time" is exactly that—a "general" assignment that, "[b]y its nature, does not continue indefinitely." *Id.* In contrast, a "specific" assignment is to a specific case. *Id.* "If a specific judge is assigned to preside in a specific case, that assignment must be withdrawn before any other judge may do so." *Id.* Thus here, the July 29 assignment order —not the December 21 assignment order—is the specific assignment. *See id.*; *see also In re Canales*, 52 S.W.3d 698, 700 (Tex. 2001) (orig. proceeding) (noting that visiting judge was first assigned by general assignment to court for period of time, and later by specific assignment to particular case). By using the incorrect labels to interpret the assignment orders, the majority opinion renders the specific assignment meaningless.

The July 28 assignment order was a "general" assignment by the Eighth Region's Presiding Judge that expressly authorized the First Region's Presiding Judge to reassign Judge Gallagher to a specific case within the stated 157-day period. The First Region's Presiding Judge did exactly that. Within the specified period and under the authority given, she made a "specific" assignment for Judge Gallagher to preside over the underlying cases. As specifically stated in the July 29 assignment order, that assignment continued "until plenary power ... expired or the [First Region's] Presiding Judge ... terminated th[e] assignment in writing[.]"

The second general assignment issued by the Eighth Region's Presiding Judge—the December 21 assignment order—was superfluous, irrelevant to, and had no effect on the specific assignment order issued by the First Region's Presiding Judge in accordance with and pursuant to the authority granted to her by the Eighth Region's Presiding Judge five months earlier. The December 21 assignment order does not mention the underlying cases—it simply gave the First Region's Presiding Judge the authority to "reassign" Judge Gallagher to any case she wanted during a 366-day period. The First Region's Presiding Judge did not need to specifically assign Judge Gallagher to the underlying cases again, and she did not, because he was already specifically assigned to these cases by the July 29 assignment order.

Because the Eighth Region's Presiding Judge gave the First Region's Presiding Judge authority to assign Judge Gallagher, his specific assignment to the underlying cases in the July 29 assignment order was valid and continued unless and until it was terminated, as specifically stated in the order. The case law is clear that once the Eighth Region's Presiding Judge authorized the First Region's Presiding Judge's reassignment (which she exercised in the July 29 assignment order), and there was no specific order assigning a new judge to the underlying cases (or valid basis to remove Judge Gallagher), Judge Gallagher was authorized to preside over the underlying cases to conclusion. *See In re Republic Parking Sys.*, 60 S.W.3d at 879. I would therefore conclude that the assignment orders gave Judge Gallagher the authority to order the change of venue to Harris County.

***4** Though en banc reconsideration of a case is not favored, the Court has discretion to determine that the extraordinary circumstances of this case warrant a second look. *See* TEX. R. APP. P. 41.2(c); *see also Tex. Dep't of Fam. & Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2019 WL 6608700, at *1 (Tex. App.—Austin Dec. 5, 2019,

mem. order) (Triana, J., dissenting opinion to denial of en banc reh'g) (appellate rules "do not define what constitutes 'extraordinary circumstances,' " but "courts have discretion to determine whether such circumstances exist in a given case"); *cf.* *Polasek v. State*, 16 S.W.3d 82, 86 (Tex. App.—Houston [1st Dist.] 2000, pet ref'd) (en banc) ("We hold that our internal decision to proceed en banc is a matter of absolute discretion that is not reviewable."); Michael J. Ritter, *En Banc Review in Texas Courts of Appeals*, 39 REV. LITIG. 377, 379 (2020) (asserting that "the en banc court's disagreement with a panel's decision is the most well-supported reason for granting en banc review"). Because the Court has chosen not to exercise that discretion, I am concerned the majority opinion's holding that a subsequent general assignment trumps an earlier specific assignment, even when the subsequent general assignment does not mention the cases that are the subject of the earlier specific assignment, will lead to the very result the majority opinion rightly seeks to avoid by creating confusion about the scope and effect of assignment orders within the shared jurisdiction of Houston's two appellate courts and by undermining the effective administration of the courts.

Assignments of elected and visiting judges are a routine practice across the state, and the resolution of this original proceeding is likely to guide the interpretation of assignment orders. The Court therefore must correctly analyze assignment orders by giving meaning to their clear language and by applying relevant case law and statutes, not only to provide consistent guidance, but also to ensure the efficient administration of justice.

Accordingly, I respectfully dissent from the denial of en banc reconsideration.

All Citations

--- S.W.3d ----, 2021 WL 4095254 (Mem)

Footnotes

1 I note the conflict the majority opinion perceives appears to be between the December 21 assignment order, entered by the Eighth Region's Presiding Judge, and the December 18 assignment order, entered by the First Region's Presiding Judge. Given that the December 18 assignment order does not reference the underlying cases, and instead references a matter related to grand jury proceedings, this would be error. The Court's analysis should be of the July 29 assignment order that specifically assigned Judge Gallagher to the underlying cases.

APPENDIX TAB 4

Governor Abbott Appoints Wheless Presiding Judge Of The First Administrative Judicial Region

March 16, 2018 | Austin, Texas | Appointment

Governor Greg Abbott has appointed Ray Wheless as presiding judge of the First Administrative Judicial Region for a term set to expire four years from the date of qualification.

Ray Wheless of Allen is judge of the 366th District Court. He is the chair of the Specialty Courts Advisory Council and the immediate past president of the Texas Association of Specialty Courts. He is certified in Criminal Law, Civil Trial Law, and Personal Injury Trial Law by the Texas Board of Legal Specialization. Wheless received a Bachelor of Business Administration from California State University, San Bernardino, and a Juris Doctor degree from The University of Texas School of Law.

APPENDIX TAB 5

WR-86,920-02
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 12/21/2018 11:30 AM
Accepted 12/27/2018 10:17 AM
DEANA WILLIAMSON
CLERK

NO. WR-86,920-02

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
12/27/2018
DEANA WILLIAMSON, CLERK

IN RE THE STATE OF TEXAS Ex Rel. BRIAN W. WICE, Relator.

ON APPLICATION FOR A WRIT OF MANDAMUS
AGAINST THE FIFTH COURT OF APPEALS
CAUSE NOS. 05-17-00634-CV, 05-17-00635-CV & 05-17-00636-CV

RELATOR'S MOTION FOR REHEARING

TO THE JUDGES OF THE COURT OF CRIMINAL APPEALS:

Relator, Brian W. Wice, Collin County District Attorney Pro Tem, files this Motion for Rehearing in the above-styled and numbered matter.

Introduction

> In this country, our courts are the great levelers. The one place where a man ought to get a square deal is in a courtroom.[1]

If you're fortunate enough to be Texas Attorney General Ken Paxton, you can lawfully create and endow a defense fund to pay for an armada[2] of top-flight legal talent that most defendants can only dream of to defend yourself against three felony offenses. You can lawfully solicit hundreds of thousands of dollars from a cadre of well-heeled friends and political

---

[1] Atticus Finch, *To Kill a Mockingbird*, Universal (1962).

[2] According to Paxton's last filing, there are eleven lawyers in his employ in this case.

patrons to stock that defense fund, including a $100,000 gift from James Webb, CEO of a company your agency was investigating for fraud.[3] If you're Ken Paxton, Atticus Finch's words most certainly ring true.

What if you're Relator and all you've ever sought from the time you swore your oath was for Collin County to pay you the reasonable fee it agreed to, so that, in the words of the author of the majority opinion, you would have "the ability to proclaim to the citizens of Texas that the person responsible for a crime has been brought to justice..."[4] What if you're legally prohibited from soliciting from any person "a fee, article of value, compensation, reward, or gift, or a promise of any these" to prosecute Paxton?[5] What if you "had to spend a considerable amount of time, energy, and money engaged in more than one battle over the payment of [your] fees,"[6] and then, given the majority's ruling, will be paid $9.93 an hour for

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[3] Jim Malewitz, *Texas Attorney General Ken Paxton under probe for legal defense gift*, www.texastribune.com (Oct. 5, 2017). The Republican district attorney from Kaufman County, appointed as a special prosecutor to investigate possible claims of bribery, found that Paxton's acceptance of Webb's gift was legal because they had a "personal relationship." Matthew Choi, *District attorney closes probe into Paxton legal defense gift*, www.texastribune.com (Oct. 27, 2017).

[4] *Ex parte Mayhugh*, 512 S.W.3d 285, 307 (Tex.Crim.App. 2016).

[5] Tex. Govt. Code, § 41.004(a).

[6] *In re State of Texas Ex Rel Brian W. Wice v. Fifth Court of Appeals*, ___S.W.3d ___, 2018 WL 6072183 at *11 (Tex.Crim.App. November 21, 2018)(Richardson, J., *concurring*). All references to the Court's six opinions will be referred to as "*__."

all your pre-trial work in 2016,[7] a result described as "harsh," "unfair," and "manifestly unjust"[8] and that comes perilously close to Texas' minimum wage? What if you also face the Sword of Damocles because of the "claw back" Commissioners Court has threatened to file "to recoup what it already paid ... for [your] work on the Paxton cases."?[9] Does Atticus Finch's promise of a square deal ring true for you? Not so much.

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[7] As the special prosecution team's appellate lawyer responsible for the lion's share of the 2016 work, Relator billed 320.75 hours. If Collin County's cap of $1,000 for all his pre-trial work is the template for payment, Relator's hourly rate is $9.93; if the cap's $1,000 adjustment is employed, it becomes $18.18. *See* *20 (Alcala, J., *dissenting*)(describing payment comporting with the pre-trial cap as "an amount that no one can seriously contend is reasonable.").

[8] *14, 21, 24 (Alcala, J., *dissenting*). These rates are better described as a "travesty of a mockery of a sham of a mockery of a travesty of two mockeries of a sham." *Bananas*, MGM (1971).

[9] *11 (Richardson, J., *concurring*). Responding to the Commissioners' Draconian threat, Judge Richardson makes a compelling and persuasive legal argument that because "the first payment by the Commissioners Court was a clear ratification of the agreement to pay [the $300 an hour] requested for work already incurred, the Commissioners Court should not be entitled to recoup the fees already paid." *Id.* Moreover, the majority appears to adopt Judge Richardson's conclusion that the Commissioners' ratification of the agreement to pay Relators $300 an hour after being placed on notice as to whether the agreement was valid waived their right to claw back funds already paid to Relators. "The Commissioners Court appears to have already [waived this claim] when it voted to approve the first payment to the appointed prosecutors after rejecting the same statutory arguments presented to this Court in this case." *8 n. 63, *citing Rodgers v. Taylor*, 368 S.W.2d 794, 797 (Tex.Civ.App.– Eastland 1963, writ ref'd n.r.e.)(commissioners court had the power to, and did in fact, ratify allegedly unauthorized agreement with court reporter because it had authority to authorize payment for his services); *Id.* at n. 60, *citing Galveston Cty. v. Gresham*, 220 S.W.2d 560, 563 (Tex.Civ.App. – Galveston 1920, writ ref'd)(commissioners court ratified agreement previously entered into by unauthorized party by accepting services of legal counsel).

Engaging in the statutory interpretation required to harmonize the plain language of Articles 26.05 and 2.07, the majority has seemingly lost sight of what this case is about. While it is painfully clear that "the color of money is the name of the game,"[10] any conceivable allusion to Relators' avarice,[11] is wide of the mark. When it comes to the real "color of money" that drives this case, and the Court's decision to grant rehearing, consider:

- Collin County, Texas' wealthiest major county,[12] spent $8,669,750 in indigent defense in 2016, $8,633,423 in 2017, and budgeted the sum of $9,000,000 in 2018, all without regard to any fees paid to Relators in those fiscal years.[13]

- Commissioner's Court authorized payment of up to $375 an hour to private attorneys the Commissioners Court has engaged to fight paying [Relators] $300 an hour."[14]

- Collin County paid attorney Marc Fratter more than $460,000 in fees for his indigent defense work in 2018, *twice the amount the*

[10] *13 n. 2 (Yeary, J., *concurring and dissenting*)(citation omitted).

[11] *See id.* at *13. ("Could not some other court presiding over a civil suit addressing these circumstances conclude that the first payment to pro tem counsel – in an amount exceeding $200,000 – was far more sufficient compensation for all the work done so far?").

[12] Collin County ranks third behind three counties with populations totaling less than 1,000. *See* www.mrt.com/ 10-riches-counties-in-Texas-taxpayer.data.

[13] www.collincountytx.gov/budget/Documents/budgets/FY2018AdoptedBudget.pdf. at p. 170.

[14] *11 (Richardson, J., *concurring*).

Special Prosecutors billed in 2016.[15]

- A Collin County district judge who approved most of Fratter's fees opined without irony or regard for Relators tasked with prosecuting his long-time friend and political contemporary, "Those Collin County citizens who are indigent are entitled to have a lawyer who will zealously represent them. *And the lawyers who defend these citizens are entitled to reasonable compensation for the legal services they provide.*"[16]

The real "color of money" that forms the narrative of this case is the King's Ransom spent by Paxton, his millionaire buddy Jeff Blackard,[17] and Commissioners Court, all of whom recognized that this prosecution could not survive for long if it lacked adequate funding. Make no mistake: while it was the *Commissioners* who prevailed in this Court, *Paxton* first recognized that the best, indeed, *only way* to derail his prosecution was to de-fund it by challenging Relators' fees three years ago.[18] Why was he the

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[15] Debra Cassens Weiss, *Texas attorney earned more than $460K representing indigent defendants last year*, www.abajournal.com (Nov. 12, 2018).

[16] Valerie Wigglesworth, *Attorney's eye-popping $460,000 in earnings to defend indigent clients in Collin County prompts changes*, www.dallasnews.com (Nov. 12, 2018) (emphasis added).

[17] The Texas Supreme Court just recently declined to review the court of appeals' dismissal of Blackard's last lawsuit. *Blackard v. Schaffer*, No. 17-0182 (Dec. 14, 2018).

[18] *See* Michael Barajas, "*Stand By Your Man: How the Collin County GOP derailed Ken Paxton's prosecution and turned him into a right-wing hero.*" www.texasobserver.com (Oct. 1, 2018).

first to challenge the fees paid to any special prosecutor?[19] Perhaps as a taxpayer, Paxton wanted to save a few dollars on his 2016 taxes. Perhaps not.[20] Regardless of who gets credit for crafting the stratagem calculated to terminate – with extreme prejudice – Paxton's prosecution, this three-year ploy that could cost Collin County taxpayers more money than Relators now seek "was managed by a job, and a good job too."[21] It is against the unique backdrop of this case where the "x" axis of justice and the "y" axis of politics intersect, that Relator seeks rehearing of a decision, that unless reversed, "Twill be recorded for a precedent, and many an error by the same example will rush into the state: it cannot be."[22]

Rehearing is warranted because the Court did not address Relator's separation of powers and laches claims. Rehearing is warranted because

[19] As the court of appeals glibly recounted in acknowledging that Paxton's challenge to Rule 4.01B, the safety-valve provision in Collin County fee schedule was the first of its kind, "[F]rom the dearth of litigation on the issue, clearly [Rule 4.01B] functions without controversy – until it doesn't. And it did not here." *In re Collin Cty.*, 528 S.W.3d 807, 813 (Tex.App.– Dallas 2017).

[20] Not surprisingly, Jordan Berry, Paxton's spokesman told the media, "Attorney General Paxton is extremely grateful for the court's decision." Patrick Svitek & Emma Platoff, *Texas Court of Criminal Appeals rules against prosecutors in Ken Paxton payment case*, www.texastribune.com (Nov. 21, 2018).

[21] Gilbert & Sullivan, *Trial by Jury* (1875).

[22] William Shakespeare, *The Merchant of Venice*, Act IV, Scene 1.

the majority erroneously employs the extraordinary remedy of mandamus to sidestep the issue of whether Relator's pre-trial hourly fee of $9.93 is "reasonable," burying the lead with its analysis of a statute "that sets out how the reasonableness[23] of the particular fee at issue is determined."[24] Rehearing is appropriate and imperative because the majority's view of Articles 26.05 & 2.07 deprives indigent-defense counsel and attorneys *pro tem* of the funding essential if the constitutional guarantee of justice for all in our adversarial system means more than simply words on a page.

Argument and Reasons Why Rehearing is Warranted

A. The Court Failed to Address Relator's Separation of Powers Argument

The mandate that the courts of appeals must "show their work" by addressing all issues and arguments advanced by the parties should apply with equal force to this Court. This Court has held that Tex. R. App. P. 47.1,[25] requiring the courts of appeals to "'show their work,' ... maintains

[23] *See In re Perkins*, 512 S.W.3d 424, 432 (Tex.App.– Corpus Christi 2016)(observing that "reasonable" in Article 26.05(a) "connotes a discretionary act rather than a mandatory one" and that "article 26.05 ... recognizes the application of judicial discretion to an award of attorney's fees.").

[24] *5.

[25] The court of appeals must issue an opinion that "addresses every issue raised and necessary to final disposition of the appeal."

the integrity of the system and improves appellate practice."[26]

This Court ignored Relator's argument that the plain text of Article 26.05(c) it relied on to divest trial judges of the inherent discretion to pay reasonable attorneys fees as required by Article 26.05(a), violates the separation of powers doctrine.[27] The majority erroneously concludes that while Articles 26.05(a)-(c) and 2.07(c) are ostensibly equal, 26.05(c) is, in Orwell's words, more equal than the others[28] – at least for purposes of this prosecution – permitting it to invalidate a safety-valve provision in the fee schedules of two-thirds of Texas counties.[29] It fails to heed the warning of Justice John Marshall Harlan "against the dangers of an approach to statutory construction which confines itself to the bare words of a statute for 'literalness may strangle meaning,'"[30] even as it fails to recognize that

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[26] *Sims v. State*, 99 S.W.3d 600, 603-04 (Tex.Crim.App. 2003).

[27] Pet. Mandamus 44-48. Notably, in their myriad pleadings, the Commissioners neither cited nor distinguished any of the authorities Relator relied on to support this claim. *See* n. 31, *infra.*

[28] *29 (Walker, J., *dissenting*)("Thus, when it comes to the actual payment of attorneys pro tem, it seems obvious that article 2.07 and article 26.05(a) take higher precedence than article 26.05(c)).

[29] *21 (Alcala, J., *dissenting*).

[30] *Lynch v. Overholser*, 369 U.S. 705, 710 (1962).

its own authority compels a different result.[31] The majority opines that, "Commissioners courts lost the battle in court to rely upon limits to a trial court's authority to set fees, but they won the war in the Legislature."[32] But its belief does not survive its holding in another politically-charged prosecution: one branch's undue interference with another where the other branch cannot effectively exercise its constitutionally assigned powers violates the separation of powers doctrine.[33]

This Court has held the Supreme Court's mandate of a "reasonably level playing field at trial,"[34] is not subject to the Legislature's preference or predilection; trial courts are tasked with ensuring due process in our

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[31] Pet. Mandamus 47 n. 54, *citing Meshell v. State*, 739 S.W.2d 246, 257 (Tex.Crim.App. 1987)(Speedy Trial Act violated Separation of Powers Clause because it improperly encroached on prosecutorial discretion); *Rose v. State*, 752 S.W2d 529, 531 (Tex.Crim.App. 1987)(parole law jury charge violated Separation of Powers Clause because it unduly interfered with Executive Branch's clemency authority); *Armadillo Bail Bonds v. State*, 802 S.W.3d at 241 (art. 22.16(c)(2) "unduly interferes with the Judiciary's effective exercise of its constitutionally assigned power" and violated Separation of Powers Clause); *Williams v. State*, 707 S.W.2d 40, 45 (Tex.Crim.App. 1986)(statute requiring trial court to remit at least 95 percent of forfeited bond unduly interfered with judiciary's authority over amount of forfeited bond to be remitted and violated Separation of Powers Clause).

[32] *5.

[33] *See Ex parte Perry*, 483 S.W.3d 884, 901-02 (Tex.Crim.App. 2016)("abuse of official capacity" statute violated separation of powers doctrine as applied to sitting governor's veto power).

[34] *Ake v. Oklahoma,* 470 U.S. 68, 76-77 (1985).

adversarial system.[35] While the majority avoids the issue of whether it is unconstitutionally relegating Relators to second-class citizenship[36] by asserting that "any possible constitutional concerns present in an indigent case are not present in this case,"[37] this avowal proves too much. It ignores the fact that what it concludes is the "plain language" of Article 26.05(c), one that would pay Relator the unconscionable hourly rates of $9.93 or $18.18,[38] yields a patently absurd result the Legislature could not have intended. Indeed, the majority never defuses the claim that even if the plain language of Article 26.05(c) is not ambiguous, it should consider "the consequences of [its] particular construction"[39] that clearly portend an

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[35] *De Freece v. State*, 848 S.W.2d 150, 159 (Tex.Crim.App. 1993).

[36] *See e.g., Aguilar v. Anderson*, 855 S.W.2d 799, 815 (Tex.App.–El Paso 1993, writ den'd) (Barajas, J., *concurring and dissenting*)("Justice is impartiality which is served only if all citizens are seen as equals in the courts that adjudicate their rights.").

[37] *7; *26 (Keel, J., *dissenting*)("Rather than confront that issue, however, the majority brushes it off.").

[38] *See* p. 3, n. 7, *supra*. The majority's embrace of the one-size-fits-some Collin County cap has been rejected on due process grounds by several courts of last resort. *See Makemson v. Martin County*, 491 So. 2d 1109, 1111 (Fla. 1986); *State v. Young*, 172 P.3d 38, 143 (N.M. 2007); *Arnold v. Kemp*, 813 S.W.2d 770, 776 (Ark. 1991). While not binding, this Court has frequently relied on authority from other jurisdictions in resolving questions of first impression in cases such as this.

[39] Tex. Govt. Code, § 311.023(5)("STATUTE CONSTRUCTION AIDS. In construing a statute, *whether or not the statute is considered ambiguous on its face*, a court may consider among other matters the ... consequences of a particular construction.")(emphasis added).

absurd result far beyond Relator being paid quasi-minimum wage for all of his 2016 pre-trial work. Rehearing is required to address this claim.

B. Article 26.05(c) Cannot be Reconciled With 26.05(a) & 2.07(c)

The majority's holding is premised on its attempt at harmonizing the plain and unambiguous language of Articles 26.05(a) and 2.07(c) with what it posits is the equally plain and unambiguous language of 26.05(c).[40] But its reasoning is fatally flawed for two reasons: first, by divorcing the text of these provisions from all context, this allegedly plain text is merely pretext[41]; second, as the dissenters make clear, the plain language of these three statutes suffers from more undeniable, irreconcilable, and internal conflict than a dozen episodes of *Keeping Up with the Kardashians.*

- "[T]his Court's majority opinion improperly legislates from the bench by construing Article 26.05 in a manner that disregards the Legislature's mandate and the Collin County district judges' fee schedule provisions that each require *the payment of reasonable fees to all appointed attorneys.*" ... [T]he majority opinion's interpretation of Article 26.05, as applied here, eviscerates the reasonableness

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[40] **5-7.

[41] *See Cadena Comercial v. Alcoholic Beverage*, 518 S.W.3d 318, 353 (Tex. 2017)(Willett, J., *dissenting*)(citations and footnotes omitted)("It is said that text without context is pretext."); *see also Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)("It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.").

requirement in subsection (a)..."[42]

- "Collin County's one-size-fits-some scheme makes it impossible to pay a reasonable attorney's fee based on the variables listed in Article 26.05(a) in time-consuming and complex cases, and its fixed fee schedule fails to state reasonable fixed rates or minimum and maximum hourly rates as required by Article 26.05. ... [T]he majority renders Texas Code of Criminal Procedure Article 2.07(c) a dead letter by *setting up the possibility of paying appointed attorneys pro tem differently than appointed criminal defense* attorney*s*."[43]

- "[W]hen it comes to the actual payment of attorneys pro tem, *it seems obvious that article 2.07 and article 26.05(a) take higher precedence than article 26.05(c).*"[44]

Seeking to quell these concerns, the majority posits that, "Even if we were to assume that Article 26.05 is ambiguous," it nonetheless divests trial judges of their inherent discretion to pay pro tems and indigent-defense counsel reasonable fees – a lodestar of the criminal justice system – because the statute requires payment at either a fixed rate or maximum and minimum hourly rates.[45] But this holding is clearly foreclosed by the

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[42] **14, 20 (Alcala, J., *dissenting*)(emphasis added).

[43] *24 (Keel, J., *dissenting*)(emphasis added).

[44] *29 (Walker, J., *dissenting*)(emphasis added).

[45] *6 n. 56.

overarching principle that the separation of powers doctrine the majority did not address clearly trumps the teachings of Messrs. Scalia and Garner upon which the majority relies[46] in voiding Rule 4.01B. This safety valve provision adopted by two-thirds of Texas counties was both necessary and proper to vest trial judges with the "inherent power to compel payment of sums of money if they are reasonable and necessary in order to carry out the court's mandated responsibilities."[47] Indeed, in this politically-charged case of first impression, "[t]his inherent power is also necessary to protect and preserve the judicial powers from impairment or destruction."[48]

At the end of the day, whether the Commissioners' ploy of trying to derail Paxton's prosecution by cutting off its funding can withstand strict scrutiny before this Court was answered almost four decades ago by Texas Supreme Court Justice Franklin Spears. In taking a stand for trial judges across Texas, and reaffirming the fundamental tenet that the Legislature is not the toughest kid in the schoolyard free to beat up the judiciary and take its lunch money with impunity, Justice Spears embraced the very

[46] *See* *6 nn. 49, 55; *8 n. 64.

[47] *Vondy v. Commissioners Court of Uvalde Cty.*, 620 S.W.2d 104, 109 (Tex. 1981).

[48] *Id.*

separation of powers argument this Court has not yet addressed:

> The legislative branch of this state has the duty to provide the judiciary with the funds necessary for the judicial branch to function adequately. If this were not so, a legislative body could destroy the judiciary by refusing to adequately fund the courts. *The judiciary must have the authority to prevent any interference with or impairment of the administration of justice in this state.*[49]

This Court can give true meaning to Justice Spears' sentiments by honoring them, granting rehearing, and reaffirming the judiciary's role as an equal, not subordinate, member of the three branches of government.

C. The Commissioners' Claim is Barred by the Doctrine of Laches

As set out in Relator's petition, the Commissioners' claim is barred by the equitable doctrine of laches.[50] First, the Commissioners' 18-month delay before seeking mandamus relief was clearly unreasonable. Second, their disingenuous ruse of laying behind the log and sleeping on their rights plainly prejudiced Relators, who "continued to work on the Paxton cases, assuming they would continue to be paid $300 per hour" when the

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[49] *Id.* at 110 (emphasis added). Although Relators cited this very quotation on three different occasions, Pet. Mandamus 9, 47, 51, the Court did not discuss or distinguish its holding.

[50] Pet. Mandamus 48-50, *citing Ex parte Perez*, 398 S.W.3d 206, 215 (Tex.Crim.App. 2013); *Ex parte Bowman*, 447 S.W.3d 887, 888 (Tex.Crim.App. 2014)(per curiam).

Commissioners ratified this agreement by paying the first bill without objection.[51] Third, and most important of all, let there be no doubt – Relators would never have accepted the formidable task of prosecuting the Texas Attorney General over the last three-plus years had they been able to look into the future and discern that their pay would come within a coat of paint of minimum wage. That Relators continued to work on the case in good faith "at their own peril," especially after Commissioners ratified the agreement to pay them $300 an hour is not "unfortunate,"[52] it is the very essence of the laches claim the Court has yet to address. Because this matter should not now appear to the Court as it appeared to it when this matter was submitted almost a year ago, rehearing should be granted.[53]

Conclusion

Suppose for a moment the police chief of a small town in the county seat of a small county in West Texas is charged with sexually assaulting a prominent citizen's daughter. If the local District Attorney is recused

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[51] *See* n. 9, *supra*.

[52] *10 (Richardson, J., *concurring*).

[53] *See McGrath v. Kristensen*, 340 U.S. 162, 178 (1950)(Jackson, J., *concurring*)("The matter does not appear to me now as it appears to have appeared to me then ... I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.").

and nearby district attorneys predictably decline the appointment,[54] the district judge would be compelled to appoint private counsel as pro tems. If that county's fee schedule provide inherently penurious rates or fixed caps, what lawyer with bills to pay would even conceive of accepting such a matter, knowing he or she would likely do battle with a well-financed array of legal talent akin to what Paxton has been blessed to retain.

Suppose the flip side of the same coin: a brutal triple capital murder in a county where fees are equally penurious and the trial judge must find private counsel willing to serve. That a qualified, competent, dedicated lawyer or lawyers would be willing to hold the life of the accused in their hands in this situation is risible. But the majority's decision, as Judge Alcala's dissent makes manifest, plainly invites either of these scenarios.

Dissenting to the majority opinion in *Korematsu v. United States*, Justice Robert Jackson warned that the insidious principle the Court had announced "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[55]

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[54] *See* *12 n. 21 (Richardson, J, *concurring*).

[55] 323 U.S. 214, 246 (Jackson, J., *dissenting*). One of the darkest hours in the Court's history, *Korematsu* upheld the federal government's decision to force over 100,000 Japanese-Americans into

It is not mere hyperbole to suggest that the majority's decision is no less a loaded weapon lying about, "ready for the hand" of any Commissioners Court across Texas "that can bring forward a plausible claim of an urgent need" to derail what it sees as an unjust prosecution by de-funding it.

This Court's heritage is steeped in its deeply-felt belief that as Texas' criminal court of last resort, it has "an independent interest in ensuring... that legal proceedings appear fair to all who observe them."[56] The lens through which the Court, the parties, Mr. Paxton, and the public view this unique case, where statutes, politics, and justice all must be reconciled, compels this Court to grant rehearing to consider all of Relator's claims, and so ensure that these proceedings appear fair to all who observe them.

Prayer for Relief

Relator prays that this Court withdraw its opinion of November 21, 2018, grant this motion for rehearing, set this matter for oral argument,[57] and grant the relief sought by Relator in his petition for mandamus.

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internment camps during World War II.

[56] *Bowen v. Carnes*, 343 S.W.3d 805, 816 (Tex.Crim.App. 2011). The majority's reliance on *Bowen*, *3 n. 21, makes no mention of the paramount principle it announced alluded to above.

[57] *See Ex parte Robbins*, 478 S.W.3d 678 (Tex.Crim.App. 2014)(granting State's motion for rehearing and setting matter for oral argument).

RESPECTFULLY SUBMITTED,

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Certificate of Service

Pursuant to Tex. R. App. P. 9.5(d), I certify that this document was served on all counsel of record via electronic filing on December 21, 2018.

/s/ Brian W. Wice

BRIAN W. WICE

Certificate of Compliance

Exclusive of the exempted portions set out in Tex. R. App. P. 9.4(i)(1), this document contains 4267 words.

/s/ Brian W. Wice

BRIAN W. WICE

APPENDIX TAB 6

9/17/2019 4:41 PM
Marilyn Burgess - District Clerk Harris County
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By: J Banks
Filed: 9/17/2019 4:41 PM

Cause Nos. 155500, 1555101, & 1555102

IN THE 177TH CRIMINAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

THE STATE OF TEXAS
v.
WARREN KENNETH PAXTON, JR.

ATTORNEYS' PRO TEM MOTION THAT THIS COURT DECLARE ART. 26.05, TEX. CODE CRIM. PROC. UNCONSTITUTIONAL AS APPLIED TO THEM AND ISSUE A REVISED ORDER FOR FOR INTERIM PAYMENT THAT COMPLIES WITH ART. 26.05

TO THE HONORABLE ROBERT JOHNSON, JUDGE PRESIDING:

I. INTRODUCTION: IT IS LEGALLY IMPOSSIBLE FOR THIS COURT TO COMPLY WITH THE COURT OF CRIMINAL APPEALS' MANDATE ON REMAND

BRIAN WICE ("Wice") and KENT SCHAFFER ("Schaffer"), Collin County District Attorneys Pro Tem ["the Special Prosecutors"], are requesting this Honorable Court to issue a revised order for interim payment of attorneys fees for work they performed from December 2, 2015 to December 31, 2016 in three felonies against Warren Kenneth Paxton, Jr. ("Paxton").[1] The Court of Criminal Appeals ("CCA") denied mandamus relief to the Special Prosecutors on November 21, 2018, vacating the second interim payment

[1] This motion incorporates by reference the Attorneys' Pro Tem MEMORANDUM OPINION ON SECOND INTERIM ORDER OF PAYMENT OF FEES TO THE ATTORNEYS PRO TEM ON REMAND FROM THE COURT OF CRIMINAL APPEALS and all attachments filed on August 8, 2019 and responds to several arguments made by Paxton in his August 30, 2019 filing objecting to the Pro Tems' filing ["Obj."].

order by Judge George Gallagher, and voiding the "opt-out"provision in the Collin County fee schedule Judge Gallagher relied on to an hourly rate of $300.[2] The CCA directed this Court to "issue a new order for payment of fees in accordance with *a fee schedule that complies with Article 26.05(c)* of the Texas Code of Criminal Procedure."[3] Accordingly, it has a ministerial duty to comply with this mandate.[4] But, as explained below, honoring the CCA's mandate would result in the Special Prosecutors being paid hourly rates of $3.13 and $4.52 for all of the work they were required to perform, and did, in fact, perform in good faith during the arduous pre-trial stage of these extraordinary and high-profile felony cases. The Special Prosecutors contend, as recounted below, that the unusual, indeed, perhaps unprecedented facts and circumstances confronting this Court on remand constrain it to hold that Article 26.05, §§ (b) and (c), mandating

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[2] *In re State of Texas Ex Rel Brian W. Wice v. Fifth Court of Appeals*, ___ S.W.3d ___, 2018 WL 6072183 at *1 (Tex.Crim.App. Nov. 21, 2018)(emphasis added). All references to this opinion are noted as "* ___" (emphasis added). Rehearing in this matter was denied without written order on June 19, 2019. The only payment that is currently at issue is the Special Prosecutors' second interim request covering the work they performed from December 2, 2015 to December 31, 2016.

[3] *9. (emphasis and boldface added). This article mandates that, "Each fee schedule adopted shall state the reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates. ..."

[4] *In re Guarino*, 64 S.W.3d 597, 600 (Tex.App.– Houston [1st Dist.] 2001, no pet.).

payment of attorneys fees be made according to a fee schedule adopted by the local judges, is unconstitutional as applied to the Special Prosecutors.[5] As a result, the Special Prosecutors ask this Court to find that it is legally impossible for it to comply with the CCA's mandate on remand.[6]

II. PAXTON HAS NO STANDING TO INTERVENE IN THIS FEE RESOLUTION

As the Special Prosecutors have long contended, neither Paxton nor his counsel have any standing to intervene in this fee resolution. The only party with standing is Collin County Commissioners Court ("CCCC"), by and through their counsel. Indeed, the best evidence of Paxton's lack of standing is his legal team's concession on the record that they "do not have a dog in the [fee resolution] fight,"[7] and their failure to intervene in the mandamus proceedings in either the Court of Criminal Appeals or the

[5] The Special Prosecutors have attached the form mandated by Tex. Govt. Code, § 402.010 as part of their constitutional challenge as applied to Art. 26.05.

[6] *See Lockyer v. City and County of San Francisco*, 17 Cal. Rptr. 225, 231, 242 (Cal. 2004) (once a statute has been judicially determined to be unconstitutional, public officials are not subject to mandamus for refusing to discharge their ministerial statutory duty to enforce the statute); *see also Kansas City, M. & O. Ry. Co. of Texas v. State*, 163 S.W. 582, 585 (Tex. 1914)("The district court having granted the writ [of mandamus], and conditions having arisen which renders it legally impossible for the corporation to comply, we believe its enforcement should be suspended until conditions shall so change as to put it in the power of the corporation to obey.").

[7] This concession was made at a hearing on the State's motion for continuance. Tellingly, Paxton avoids any mention of this concession on the part of his defense team. Neither does he favor this Court with any authority that supports the unsupportable principle that he is entitled to a legal team advancing two diametrically opposed and inherently contradictory legal positions.

Fifth Court of Appeals. Paxton nevertheless seeks to "submit amici briefs to the Court" on the fee issue.[8] While this Court cannot preclude Paxton – or any other litigant for that matter – from filing anything the District Clerk accepts, the law is clear that this Court is not obliged to consider Paxton's "amici" filings.[9]

III. Evidence the Special Prosecutors have Submitted in Support of their Request

The Special Prosecutors have previously submitted five affidavits from Christopher Downey, Wendell Odom, Jr., and Michael McCrum, a trio of experienced and well-respected criminal defense attorneys who have served as attorneys *pro tem* on myriad occasions; Murry Cohen, who spent two decades as a justice on the First Court of Appeals; and James Bethke, former Executive Director of the Texas Commission on Indigent Defense. These affidavits, which the Special Prosecutors now request this

[8] Paxton's Response to Motion for Ex Parte Determination Regarding Issuance of a New Order for Payment of Fees at 9.

[9] The Special Prosecutors have withdrawn their request for an *ex parte* resolution of their attorneys fees. But the Texarkana Court of Appeals has only recently reaffirmed the fundamental principle that, "The actual payment of defense counsel's fees is purely an administrative matter. The State's attorney has no role in the payment of fee requests or the establishment of fee schedules." *Morrison v. State*, 575 S.W.3d 1, 15 (Tex.App.– Texarkana 2019, no pet.). If it is true that a good rule works both ways, *Montemayor v. State*, 543 S.W.2d 93, 99 (Tex.Crim.App. 1976)(Douglas, J., *dissenting*), the Special Prosecutors contend there is no reason why Paxton should have any role in this Court's resolution of what attorneys fees should be paid to the Special Prosecutors on remand.

Court to find credible, speak to what fees are reasonable for the work performed by the Special Prosecutors in 2016, and why their work differs markedly from appointed defense counsel.[10] But the Special Prosecutors believe that, as a threshold question, this Court must determine what fee schedule it is obligated to consider if it is to obey the CCA's mandate.

IV. THIS COURT IS OBLIGATED TO EMPLOY THE 2016 FEE SCHEDULE

The question that informs this Court's ministerial duty to carry out the CCA's mandate is not susceptible of an easy answer.[11] Indeed, as one CCA judge opined, "It also occurs to me that the Court's disposition will likely leave the parties and the lower courts scratching their heads about *which fee schedule to base any payment upon.*"[12] Paxton asserts the CCA ordered this Court to pay the Special Prosecutors "the $1,000 payment under the provisions of the plan ruled valid by [it]." Obj. 2. Perhaps Paxton divines something in the CCA's lead opinion that mere mortals

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[10] Paxton has not challenged the credentials of these affiants or the content of their affidavits.

[11] This Court could look to the 2017 Collin County Fee Schedule that was amended to delete the invalid "opt-out" provision and created an hourly rate of from $50-$100 in felony cases. But this fee schedule became effective on March 1, 2017, after the Special Prosecutors' appointment. Another option, given the CCA's use of the descriptor "a" instead of "the," in its mandate that payment be made in accordance with "*a fee schedule* that complies with Article 26.05(c)" is for this Court to employ *any fee schedule* from any county in Texas.

[12] *13 (Yeary, J., *concurring and dissenting*)(emphasis added).

cannot. Perhaps not. Had the CCA intended to hold what Paxton claims it did, it could have easily said so by merely directing this Court to issue a new order using *the 2016 fee schedule*. Of course, it did no such thing.

But assuming without deciding that the CCA intended this Court to employ the 2016 Collin County fee schedule capping all pre-trial work done at $1,000 (with one discretionary increment of $1,000), this Court must determine if this fee schedule is a valid "fee schedule that complies with Article 26.05(c),"[13] and whether it withstands constitutional scrutiny as applied to the Special Prosecutors. As noted below, it is contended that, at least in its present form, the 2016 Collin County fee schedule is not "a [constitutionally] valid fee schedule..."

V. THE 2016 COLLIN COUNTY FEE SCHEDULE IS AN UNCONSTITUTIONAL APPLICATION OF ARTICLE 26.05 GIVEN THE UNIQUE FACTS OF THIS CASE

A litigant who raises an "as applied" challenge to a statute concedes the general constitutionality of the statute, but asserts that the statute is unconstitutional as applied to his particular facts and circumstances.[14] Because a statute may be valid as applied to one set of facts and invalid

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[13] *9.

[14] *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex.Crim.App. 2011).

as applied to a different set of facts, a litigant must show that, in its operation, the challenged statute was unconstitutionally applied to his discrete facts and circumstances.[15]

An "as applied challenge" is usually brought during or after a trial or hearing on the merits; it is only then that the trial judge and appellate courts have the particular facts and circumstances of the case needed to determine whether the statute has been applied in an unconstitutional manner.[16] But the CCA has concluded that certain types of claims may be litigated by pretrial habeas, including an "as applied" challenge if the rights underlying the claims "would be effectively undermined if not vindicated before trial."[17] Because the Special Prosecutors believe this Court should credit the evidence before it supporting their "as applied" challenge, and believe that the rights underlying their claim will be effectively undermined if not vindicated before Paxton's trial, this Court should hold that the Special Prosecutors' "as applied" challenge is properly

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[15] *Id.*

[16] *Id.*

[17] *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex.Crim.App. 2016)(permitting Texas Governor to bring an "as applied" challenge to statute prior to trial because the constitutional right he sought to urge would have been effectively undermined if not vindicated prior to trial).

before it.[18]

This Court can take judicial notice that, if Mr. Wice is paid according to the presumptive cap in the 2016 Collin County fee schedule for his pre-trial work in 2016, he would be paid $3.13 an hour.[19] Because Mr. Schaffer billed 221.50 hours, his hourly rate after applying the cap of $1,000, is $4.52. It should not take long for this Court to conclude that these hourly rates: (1) fall well below Texas' minimum wage and are *unreasonable* as a matter of law; (2) violate the mandatory directive in Article 26.05(a) that the Special Prosecutors shall be paid a *reasonable* attorneys fee; and (3) violate the mandatory dictate in Article 26.05(c) that the 2016 fee schedule shall state *reasonable* fixed rates or minimum and maximum hourly rates.[20] This Court should, accordingly, hold that Article 26.05, §§ (b) and (c) of the Code of Criminal Procedure mandating that the Special Prosecutors be paid according to the 2016 Collin County fee schedule, is unconstitutional as applied to them in violation of the Due Process and

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[18] *See id.* The Special Prosecutors have attached the form required by Tex. Govt. Code, § 402.010 whenever a party files a pleading challenging the constitutionality of a state statute.

[19] This Court can take judicial notice that the Special Prosecutors mistakenly claimed in their pleadings to the CCA that their hourly rate would be $9.93 if they were to be paid the $1,000 cap the Collin County 2016 fee schedule provided. MOTION FOR REHEARING at 3.

[20] (Emphasis added).

Equal Protection Clauses of the United States Constitution, and the Due Course of Law Clause of the Texas Constitution.[21]

VI. SEVERABILITY, THE PARTIES' INTENT, AND LEGISLATIVE INTENT

It is noteworthy that in denying the Special Prosecutors mandamus relief, the CCA was "not called upon to determine whether the payment ordered in this case is reasonable."[22] Neither was the CCA called upon to determine if the 2016 Collin County fee schedule was unconstitutional as applied to the Special Prosecutors in this case.[23] The only issue before the CCA was whether Article 26.05 "limits the trial court's ability to approve an hourly rate when the fee schedule approved by the [Collin County] judges prescribes a fixed rate."[24]

The 2016 Collin County fee schedule that drove the CCA's decision involved two key components: the presumptive cap of $1,000 for all work

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[21] *See e.g., Ex parte Boetscher*, 812 S.W.2d 600, 604 (Tex.Crim.App. 1991)(law that made offense of criminal non-support a misdemeanor for Texas residents but a felony for non-residents was unconstitutional as applied to non-resident defendant); *Ex parte Perry*, 483 S.W.3d at 895 (sustaining as-applied challenge to criminalization of Texas Governor's use of his veto power).

[22] *1.

[23] The Special Prosecutors correctly pointed out in their Motion for Rehearing that the CCA also did not address their separation of powers and laches contentions. *Id.* at 6-7.

[24] *1.

performed pre-trial and Rule 4.01(B), the "opt-out" rule that was found to have impermissibly given the trial judge the ability "to approve an hourly rate when the fee schedule approved by the local judges prescribes a fixed rate."[25] When the 2016 fee schedule was enacted by the Collin County District Judges, with its presumptive cap of $1,000 for all pre-trial work performed, it would have been constitutionally infirm without the opt-out provision. Had the Collin County District Judges known at the time that the opt-out provision was invalid, they would have presumably enacted a fee schedule that complied with the mandates in Article 26.05(a) and (c) by providing for a broader range of hourly minimum and maximum hourly rates. This Court can take judicial notice that the Special Prosecutors would certainly not have agreed to take on this extraordinary and high-profile prosecution of the State's top law enforcement officer against a host of highly-talented and well-funded defense lawyers had they known that their fees were capped at $1,000 for the hundreds of hours of preparation required in the pre-trial stage of these three felony prosecutions.

By way of analogy, if the 2016 fee schedule the Special Prosecutors

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[25] *Id.*

agreed to be paid from is akin to a contract with the "opt-out" rule being an illegal or unconscionable provision, the "opt-out" provision could be severed so long as it did not constitute the essential purpose of the parties' agreement.[26] But because the relevant inquiry for this Court is whether the Special Prosecutors would have entered into the fee agreement absent the unenforceable "opt-out" provision,[27] – which they would not have – this provision is not severable from the remainder of the 2016 fee schedule.

Article 26.05 does not contain a severability clause. Even if it did, severability would be neither feasible nor appropriate given that this issue is informed by an as applied challenge and not a facial challenge.[28] Even in a facially unconstitutional challenge, an unconstitutional provision may not be severed where, as here, the presumptively valid ($1,000 pre-trial cap) and invalid ("opt-out") clauses are so inextricably linked that a severance renders Article 26.05 incomplete or contrary to the legislative intent[29] that the Special Prosecutors "shall be paid *a reasonable attorney's*

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[26] *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978).

[27] *In re Poly-America, L.P.*, 262 S.W.3d 337, 360 (Tex. 2008).

[28] *See Salinas v. State*, 523 S.W.3d 103, 110 (Tex.Crim.App. 2017).

[29] *Ex parte Perry*, 483 S.W.3d at 903.

fee based on the time and labor required, the complexity of [this] case, and [their] experience and ability."[30] Accordingly, this Court should hold that it is legally impossible for it to comply with the CCA's mandate that it "issue a new order for payment of fees in accordance with a fee schedule that complies with Article 26.05(c)..."[31]

VI. THE SPECIAL PROSECUTORS NO LONGER BELIEVE THAT THE COLLIN COUNTY DISTRICT JUDGES SHOULD BE GIVEN THE OPPORTUNITY TO RETROACTIVELY AMEND THE 2016 FEE SCHEDULE

While the Special Prosecutors have argued that the Collin County Board of Judges should be given the chance to retroactively amend the 2016 fee schedule to bring it into compliance with Art. 26.05, they now withdraw this submission. Given public pronouncements by Collin County officials that they will not pay the Special Prosecutors a penny more than they have already been paid, asking the Board of District Judges to take any action that might conceivably be seen as being adverse to Paxton would require the doing of a useless act which the law does not require.[32]

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[30] Article 26.05(a). (emphasis added).

[31] *9.

[32] *Saenz v. State*, 474 S.W.3d 47, 52 n. 3 (Tex.App.– Houston [14th Dist.] 2015, no pet.). Paxton's argument that retroactively amending the 2016 fee schedule would result in a "plethora of challenges" from defense attorneys seeking additional compensation, Obj. 3n. 3, fails because those challenges are time-barred and estoppel-barred because these attorneys accepted their compensation.

The Special Prosecutors ask that this Court grant their motion, hold Art. 26.05 and the 2016 Collin County fee schedule unconstitutional as applied to them, and enter a revised second interim payment order for 2016 that complies with Art. 26.05 of the Code of Criminal Procedure.

RESPECTFULLY SUBMITTED,

/s/ BRIAN W. WICE

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kentschaffer@gmail.com

ATTORNEYS PRO TEM
THE STATE OF TEXAS

CERTIFICATE OF SERVICE

This motion was served on all counsel via e-filing on October 17, 2019.

/s/ BRIAN W. WICE

BRIAN W. WICE

APPENDIX TAB 7

COLLIN COUNTY

OFFICE OF COUNTY AUDITOR
2300 Bloomdale Road • Suite 3100
McKinney, Texas 75071
(972) 548-4731 • Metro (972) 424-1460
Fax (972) 548-4696

Certified Mail, Return Receipt Requested
7005 1820 0000 6482 8302

November 22, 2019

Brian Wice
4400 Louisiana, # 900
Houston, Texas 77002

Re: The State of Texas vs. Warren Kenneth Paxton, Jr.
416th Judicial District Court of Collin County, Texas
Case No. 416-81913-2015
Case No. 416-82148-2015
Case No. 416-82149-2015

Dear Mr. Wice:

This letter is your notice of the valid claim of Collin County, Texas ("the County"), against you. The purpose of this letter is to collect the amount of the claim.

The County's claim against you is for the following: $108,480.45, previously paid to you improperly on January 6, 2016, as Attorney Pro Tem fees, which fees were in excess of the fees authorized by law.

On behalf of the County, I request that you pay the amount of the claim in full immediately. The County's address for payment is as set forth at the top of this letter.

If you fail to pay this claim, the County reserves its right to file suit against you seeking judgment for the recovery of the full amount of the claim and all other lawfully recoverable amounts, including the County's reasonable attorney's fees incurred in collecting this claim and costs of court.

Sincerely,

Linda Riggs

Linda Riggs
Collin County Auditor

LR/

APPENDIX TAB 8

BLANKROME
717 Texas Avenue | Suite 1400 | Houston, TX 77002

December 4, 2019

Via CM/RRR #70071490000022280976

Ms. Linda Riggs
Collin County Auditor
2300 Bloomdale Road, Suite 3100
McKinney, Texas 75701

Re: *The State of Texas v. Warren Kenneth Paxton, Jr.;* Case Nos. 155500, 1555101, & 1555102, in the 177th Criminal District Court of Harris County, Texas (the "Paxton prosecution")

Dear Ms. Riggs:

Brian Wice and Kent Schaffer have engaged Blank Rome LLP to respond to your November 22, 2019 letter, which demands immediate repayment of fees the Collin County Commissioners Court earlier authorized be paid as reasonable attorney's fees for services they have rendered as Collin County District Attorneys Pro Tem in the Paxton prosecution.

Your letter appears to be the latest in a series of partisan and improper attempts by various elected and appointed Collin County officials to interfere with the public duties of the District Attorneys Pro Tem and disrupt the Paxton prosecution by the State of Texas that is pending in the 177th Criminal District Court of Harris County, Texas (the "Criminal District Court"). For that reason, the actions threatened by Collin County also are an affront to the Criminal District Court and will directly interfere with its jurisdiction over, and administration of, the Paxton prosecution.

As discussed in detail by the Judges of the Court of Criminal Appeals in *In re State ex rel. Wice v. Fifth Judicial Dist. Court of Appeals*, 581 S.W.3d 189, 199 n. 63, 203-04, (Tex. Crim. App. 2018), the Collin County Commissioners Court was authorized to approve the funding of the fees paid to Messrs. Wice and Schaffer, which was necessary to assist the criminal district court in carrying out its responsibilities, and "a valid payment of county funds."

Messrs. Wice and Schaffer had a clearly-established legal right to be paid the funds at issue and have a clearly-established vested property interest in those funds that is protected under the Texas and United States Constitutions and Texas common law. For those reasons, among others, your letter and the threatened actions by Collin County may subject the County, you, the County Judge and individual Collin County Commissioners to personal liability for actions which interfere with the clearly-established constitutional, statutory and common law rights of Messrs. Wice and Schaffer.

If you have not already done so, I invite you, the County Judge and the Collin County Commissioners to consult with independent legal counsel of your choosing concerning the potential legal liability of the County and each of you individually, should the County persist in its threatened course of action.

Very truly yours,

Barry Abrams

cc. ***Via CM/RRR #70071490000022280983***
County Judge Chris Hill
Commissioner Susan Fletcher
Commissioner Cheryl Williams
Commissioner Darrell Hale
Commissioner Duncan Webb
Collin County Commissioners Court
Collin County Administration Building
2300 Bloomdale Rd., Suite 4192
McKinney, TX 75071

APPENDIX TAB 9

REPORTER'S RECORD

Volume 1 of 1 Volume

Trial Court Cause Nos. 1555100, 1555101 & 1555102

THE STATE OF TEXAS	:	IN THE DISTRICT COURT OF
VS.	:	HARRIS COUNTY, T E X A S
WARREN KENNETH PAXTON, JR.	:	177TH JUDICIAL DISTRICT

COURT'S RULING ON MOTION TO SET ASIDE CHANGE OF VENUE AND RETURN CASES TO COLLIN COUNTY, TEXAS VIA ZOOM

On the 25th day of June, 2020, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Robert Johnson, Judge presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Linda Hacker, Texas CSR #4167
Official Court Reporter - 177th District Court
1201 Franklin, 19th Floor
Houston, Texas 77002
832-927-4250

A P P E A R A N C E S

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ATTORNEYS FOR DEFENDANT, WARREN KENNETH PAXTON, JR., VIA ZOOM

P R O C E E D I N G S

June 25, 2020

THE COURT: We're back on the record.

Let the record reflect Defense counsel is present along with the defendant, Mr. Paxton. The State is present. The parties are appearing by Zoom, and we're going to pick up on Mr. Paxton's Motion to Set Aside Change of Venue as Void and Return Cases to Collin County.

Anything further from the Defense concerning that motion?

MR. COGDELL: No, sir. It's articulated in the motion.

THE COURT: Anything further from the State?

MR. WICE: No, Your Honor. We believe that the issue has been adequately briefed on both sides.

THE COURT: After hearing the arguments of the parties, the Court finds that the appoint -- appointment order concerning Judge George Gallagher did expire prior to the signing of the State's order for change of venue. In reaching this conclusion, the Court relies upon *In Re BFB,* 241

S.W.3d 643 (2007); *Ex Parte Eastland,* 811 S.W.2d 571 (1991); and *Wilson vs. State,* 977 S.W.2d 379 (1998). Therefore, defendant's motion to set aside change of venue as void is granted.

The Court will sign a written order to that effect. That is the ruling of the Court.

We're off the record.

(Off the record.)

THE COURT: We're back on the record.

State, you had something you wanted to say. Go ahead.

MR. WICE: Absolutely, Judge. Under Rule 52.10(a) of the Rules of Appellate Procedure, I am required to notify all the parties as well as the Court that the State intends to seek emergency relief in the Court of Appeals in anticipation of filing a Writ of Mandamus in either the First or the Fourteenth Courts of Appeals. I will follow it up with an e-mail to all the parties as well as a copy of the request for emergency relief.

I would also ask that the court reporter make available a transcription of both this call -- excuse me -- as well as the call that we had

two weeks ago as soon as is practical and that the Court cause the orders on the motion it ruled on today to be done so in writing at its earliest possible convenience.

THE COURT: Anything else?

MR. WICE: And one other thing, Judge. I -- I would again re-urge as we have in the past our request that the Court rule, that it discharge its ministerial duty to rule on Nicole DeBorde's unopposed Motion to Withdraw that's been pending for a year and to honor the Court of Criminal Appeals mandate in State ex rel. Wice vs. Fifth Court of Appeals to fashion a revised payment order that complies with Article 26.05(c), all of which happened well in advance of Mr. Paxton filing the motion that the Court has ruled on today. I would again make those formal requests on the record.

THE COURT: I -- I don't believe this Court has jurisdiction. Therefore, I'm not going to rule on those two outstanding motions.

MR. WICE: Okay. I would also reiterate for the purposes of the record that over the course of the past year since this Court has re-acquired jurisdiction that the State has

repeatedly asked this Court to rule on both the unopposed motion of Nicole DeBorde to withdraw and its own motion for the Court to fashion a revised payment order that complies with the mandate of the Court of Criminal Appeals.

THE COURT: Anything further?

MR. COGDELL: Not from the Defense, Your Honor.

THE COURT: State?

MR. WICE: Judge, I would ask that the court reporter notify me personally as to when she believes she could arrange for the transcription of the court reporter's notes from this hearing today being available because I have to let the Court of Appeals know -- I have to let the Court of Appeals know when it is that we can anticipate that record being filed as part of our record when we file our request for emergency relief in our petition for Writ of Mandamus to not only set aside the Court's ruling today but to compel the Court to rule on our motion to honor the Court of Criminal Appeals mandate.

THE COURT: Okay. Anything else, Attorney Wice?

MR. WICE: No, Your Honor.

THE COURT: Okay. All right. Thank you, gentlemen. Have a good day.

MR. COGDELL: Thank you, Your Honor.

THE COURT: All right. Bye-bye.

(Off the record.)

(Proceedings concluded.)

THE STATE OF TEXAS :

COUNTY OF HARRIS :

I, LINDA HACKER, Official Court Reporter in and for the 177th District Court of Harris County, Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open Court or in Chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $_____ and was paid or will be paid by Mr. Brian Wice.

WITNESS MY OFFICIAL HAND on this the 26th day of June, 2020.

/s/ Linda Hacker
LINDA HACKER, CSR No. 4167
Expiration Date: 1-31-21
Official Court Reporter
177th District Court
201 Caroline, 13th Floor
Houston, Texas 77002
832-927-4250

APPENDIX TAB 10

7/17/2019 2:01 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 35203328
By: B Young
Filed: 7/17/2019 2:01 PM

CAUSE NOS. 1555100, 1555101, 1555102

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
	§	
WARREN KENNETH PAXTON, JR.	§	177TH JUDICIAL DISTRICT

ATTORNEYS PRO TEM'S MOTION FOR *EX PARTE* DETERMINATION REGARDING ISSUANCE OF A NEW ORDER FOR PAYMENT OF FEES

To the Honorable Robert Johnson, Presiding Judge:

This ancillary matter concerns the compensation of attorneys who serve as attorneys pro tem for the State of Texas. The attorneys pro tem in this matter, Brian Wice and Kent Schaffer (the "Attorneys Pro Tem"), are due payment for work performed in 2016 resulting from their appointment by a Collin County state district judge. The issue before this court is simply framed by the Court of Criminal Appeals: issue a new order for payment of fees in accordance with a fee schedule that complies with Article 26.05(c) of the Texas Code of Criminal Procedure.[1]

BACKGROUND

The Attorneys Pro Tem were appointed by the Local Administrative Judge for Collin County following two events in 2015: (1) the Public Integrity Unit of the Texas Rangers forwarded a formal complaint against Kenneth Paxton concerning alleged conduct by Paxton before he became Attorney General to the Collin County District Attorney's Office and (2) the recusal of the Collin County District Attorney and his office from all matters related to the complaint.[2] The

[1] *In re State of Texas Ex Rel Brian W. Wice v. Fifth Court of Appeals*, ___ S.W.3d ___, 2018 WL 6072183 at *1 (Tex. Crim. App. Nov. 21, 2018). All references to this opinion are noted as "*__." The only payment that is currently at issue is the Attorneys Pro Tem's second interim request covering the work they performed in 2016.

[2] *1.

Local Administrative Judge agreed to pay the Attorneys Pro Tem a fee of $300 per hour for their professional services based upon a local rule authorizing a judge to order payment varying from the fee schedule in Collin County in appropriate circumstances.[3]

The Attorneys Pro Tem's first submission for fees and expenses was approved by a district judge who issued an order for payment.[4] The Collin County Commissioner's Court paid the Attorneys Pro Tem pursuant to that order. When the Attorneys Pro Tem submitted a second submission for payment of fees and expenses incurred in 2016, the district judge reviewed their submission, approved it for payment and issued a second order for payment.[5] The Collin County Commissioner's Court rejected that order for payment and initiated litigation.[6]

That litigation effectively ended on November 21, 2018, when a divided Court of Criminal Appeals rendered its decision. The Court of Criminal Appeals held that that Texas Code of Criminal Procedure Article 26.05(c) trumped a local Collin County rule permitting trial judges to deviate from the fee schedule mandated by Article 26.05(c).[7] The majority found that the agreement the Attorneys Pro Tem entered into with the Local Administrative Judge who appointed them was unlawful because the 2016 Collin County fee schedule approved by the judges merely prescribed a fixed rate of $1,000 for all pre-trial work done[8] and did not include hourly minimum

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[3] *1, 3.

[4] Judge George Gallagher, the Tarrant County judge initially assigned to these matters by then-Regional Administrative Judge Mary Murphy in July 2015, approved this initial order for payment. Judge Gallagher was removed from this proceeding after he ordered a change of venue from Collin County to Harris County and the defense withheld its consent to him remaining as the presiding judge pursuant to Article 31.09(a) of the Code of Criminal Procedure.

[5] The second order for interim payment was entered by Judge George Gallagher in January of 2017.

[6] *2.

[7] *1. Judge Newell's majority opinion was joined by Presiding Judge Keller, and Judges Keasler, Hervey, and Richardson; Judge Richardson filed a concurring opinion; Judge Yeary filed a concurring and dissenting opinion; and Judges Alcala, Keel, and Walker filed dissenting opinions.

[8] The 2016 fee schedule provided for a presumptive adjustment of this amount to $2,000.

and maximum rates as required by Article 26.05(c).[9] The majority "vacate[d] the trial court's second order for interim payment and order[ed] the trial court to issue a new order for payment of fees in accordance with *a fee schedule* that complies with [Article 26.05(c)]."[10] The majority, however, made it clear that:

> Nothing in this Court's opinion should be read as announcing a "one size fits all" scheme for payment of fees. *Trial judges in Texas can develop a wide array of payment structures to account for unforeseen circumstances.* They simply must be based upon reasonable fixed rates or minimum and maximum hourly rates.[11]

The Court of Criminal Appeals has thus tasked this Court with the responsibility of fashioning a second payment order for the Attorneys Pro Tem comporting with its mandate and provided the parameters for doing so.

ARGUMENT AND AUTHORITIES

This Court must issue a new order for payment of fees in accordance with *a fee schedule* other than the now-discredited 2016 Collin County fee schedule that complies with [Article 26.05(c)]."[12] The Attorneys Pro Tem's request that this be done on an *ex parte* basis breaks no new legal ground. Texas Code of Criminal Procedure Article 2.07(b)[13] provides that private attorneys appointed as attorneys pro tem are paid "in the same amount and manner" as attorneys representing indigent defendants. Trial courts across the State of Texas routinely make decisions

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[9] *1.

[10] *9. (emphasis added).

[11] *9 n. 67. (emphasis added).

[12] *9. (emphasis added). As noted above, the plain language of the majority opinion that refers to "*a* fee schedule" makes it clear that in fashioning a revised payment order, this Court has the discretion to consider *any* county's fee schedule that complies with Article 26.05(c).

[13] This article was amended by the 86th Legislature. The amendments, which become effective September 1, 2019, apply only to the appointment of an attorney pro tem that occurs on or after the effective date.

about appointed attorney compensation under Articles 2.07 and 26.05 on an *ex parte* basis because the actual payment of fees under these statutes "is purely an administrative matter." *See Morrison v. State*, ---S.W.3d ---, 2019 WL 1371258 at *6 (Tex. App.—Texarkana 2019) (noting that the State's attorney has no role in the payment of fee requests or the establishment of fee schedules). As this Court well knows, neither the State nor Commissioner's Court are present to contest the process by which a trial court decides the amount of fees on appointed defense counsel's voucher. There is absolutely no reason for a different result in this matter.

There is no authority suggesting that an adversarial hearing regarding the payment of fees under Articles 2.07 and 26.05 should be held. To the contrary, the Court of Criminal Appeals has consistently held in the context of defense counsel seeking funding necessary for the effective presentation of a defense, the matter must be conducted on an *ex parte* basis. *See e.g., Williams v. State*, 958 S.W.2d 186, 195 (Tex. Crim. App. 1997) (constitutional error for trial judge to overrule defendant's request to urge his request for an expert witness on an *ex parte* basis); *McKinney v. State*, 59 S.W.3d 304, 308 (Tex. App.—Fort Worth 2001, pet. ref'd) ("We are disturbed, therefore, that Appellant was required to justify his request for funds in a contested hearing in which the State participated."); *see also Dunn v. State*, 722 S.W.2d 595, 596 (Ark. 1987) (defense entitled to *ex parte* hearing regarding funding); *Arnold v. Higa*, 600 P.2d 1383, 1385 (Haw. 1979) (same); *People v. Loyer*, 425 N.W.2d 714, 722 (Mich. 1998) (same); *Manning v. State*, 726 So.2d 1152, 1191 (Miss. 1998) (prosecution has no role to play in court's decision regarding defense funding).

PRAYER FOR RELIEF

The Attorneys Pro Tem's payment is now an administrative matter for the trial court to decide. The Court of Criminal Appeals' decision provides the court with the parameters necessary for the court to use its discretion in discharging its administrative duties. Doing so on an *ex parte*

basis merely conforms to the long-standing practice of how compensation decisions under Article 26.05 and related provisions are routinely handled. The Attorneys Pro Tem therefore respectfully request that the Court grant this motion.

Respectfully submitted,

DRUMHELLER, HOLLINGSWORTH & MONTHY, LLP

/s/ Anthony D. Drumheller
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COUNSEL FOR ATTORNEYS PRO TEM

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all counsel and the Court via electronic service on July 17, 2019.

/s/ Anthony D. Drumheller (by Brian Wice, with permission)
Anthony D. Drumheller

CAUSE NO. 1555102

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
	§	
WARREN KENNETH PAXTON, JR.	§	177TH JUDICIAL DISTRICT

ORDER

ON THIS DAY came before the Court Attorneys Pro Tem's Motion for *Ex Parte* Determination Regarding Issuance of a New Order for Payment of Fees. After considering same, the Court is of the opinion that the Motion is well-taken. It is, therefore,

ORDERED, ADJUDGED and DECREED that the Motion is GRANTED and that the Court will make an *ex parte* determination regarding issuance of a new order for payment of Attorneys Pro Tem's fees.

SIGNED THIS _____ day of _____, 2019.

_____
JUDGE PRESIDING

APPENDIX TAB 11

6/25/2019 10:44 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 34674610
By: T Burnett
Filed: 6/25/2019 10:44 PM

NOS. 1555100, 1555101 & 1555102

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
V.	§	HARRIS COUNTY, TEXAS
WARREN KENNETH PAXTON, JR.	§	177TH JUDICIAL DISTRICT

MOTION FOR LEAVE TO WITHDRAW AS ATTORNEY PRO TEM

TO THE HONORABLE ROBERT JOHNSON, PRESIDING JUDGE:

COMES NOW NICOLE DEBORDE, Collin County Criminal District Attorney Pro Tem in the above-styled and numbered matters, and seeks leave of Court to withdraw in this official capacity, and in support thereof would show this Honorable Court the following:

1. The undersigned was appointed by Judge George Gallagher as a Collin County Criminal District Attorney Pro Tem in these matters on August 28, 2015.

2. As a result of a series of professional obligations over the past several months, the undersigned can no longer devote the requisite time and attention to discharging her duties as an Attorney Pro Tem in these matters.

3. The undersigned has obtained the consent of her fellow

Attorneys Pro Tem to her withdrawing in these matters.

4. This motion is not made for purposes of delay and granting same will not prejudice the State of Texas or the Defendant.

WHEREFORE, PREMISES CONSIDERED, the undersigned prays that this Honorable Court will grant her leave to withdraw as a Collin County Criminal District Attorney Pro Tem in these matters.

RESPECTFULLY SUBMITTED,

/s/ Nicole DeBorde

NICOLE DEBORDE

HOCHGLAUBE & DEBORDE, P.C.
3515 Fannin
Houston, Texas 77004
(713) 526-6300 PHONE
(713) 808-9444 FAX
Bar No. 00787344

CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. P. 9.5(d), a copy of this motion was served upon all counsel and the Court by e-filing on June 25, 2019.

/s/ Nicole DeBorde

NICOLE DEBORDE

6/26/2019 10:43 AM
Marilyn Burgess - District Clerk Harris County
Envelope No. 34683926
By: T Burnett
Filed: 6/26/2019 10:43 AM

NO. 1555102

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
V.	§	HARRIS COUNTY, TEXAS
WARREN KENNETH PAXTON, JR.	§	177TH JUDICIAL DISTRICT

ORDER OF THE COURT

CAME ON TO BE HEARD the Motion of Nicole DeBorde seeking leave of Court to withdraw as a Collin County Criminal District Attorney Pro Tem in the above-styled and numbered cases, and after considering same, the Court is of the opinion that the motion is well-taken.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this motion is GRANTED and Nicole DeBorde be and is hereby permitted to withdraw as Collin County Criminal District Attorney in these matters.

A copy of this Order shall be served on all Counsel of Record.

DONE and ENTERED this _____ day of _____, 2019.

THE HONORABLE ROBERT JOHNSON
PRESIDING JUDGE
177TH DISTRICT COURT
HARRIS COUNTY, TEXAS

APPENDIX TAB 12

REPORTER'S RECORD

Volume 1 of 1 Volume

Trial Court Cause Nos. 1555100, 1555101 & 1555102

THE STATE OF TEXAS	:	IN THE DISTRICT COURT OF
VS.	:	HARRIS COUNTY, T E X A S
WARREN KENNETH PAXTON, JR.	:	177TH JUDICIAL DISTRICT

PAXTON'S MOTION TO SET ASIDE CHANGE OF VENUE AS VOID AND RETURN CASES TO COLLIN COUNTY, TEXAS

On the 17th day of December, 2019, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Robert Johnson, Judge presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Linda Hacker, Texas CSR #4167
Official Court Reporter - 177th District Court
1201 Franklin, 19th Floor
Houston, Texas 77002
832-927-4250

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ATTORNEYS FOR DEFENDANT, WARREN KENNETH PAXTON, JR.

P R O C E E D I N G S

December 17, 2019

THE COURT: We're on the record.

The Court calls Cause No. 1555100, 1555101, 1555102, the State of Texas vs. Warren Kenneth Paxton, Jr.

Parties before the bench, please identify yourselves starting with the State.

MR. WICE: If the Court please, Brian Wice on behalf of the State of Texas.

MR. SCHAFFER: Kent Schaffer appearing on behalf of the State, Your Honor.

MR. COGDELL: Dan Cogdell for Mr. Paxton.

MR. HILDER: Phillip Hilder for Mr. Paxton.

MR. MATEJA: Bill Mateja on behalf of Mr. Paxton.

MR. AKERS: Cordt Akers on behalf of Mr. Paxton.

THE DEFENDANT: Ken Paxton, Texas Attorney General.

THE COURT: Thank you.

We are here today on Mr. Paxton's motion to have the case transferred back to Collin

County.

State, did you receive a copy of Defendant's motion, Mr. Paxton's motion?

MR. WICE: We have, Your Honor.

THE COURT: Okay. Defense, did you receive a copy of the State's answer?

MR. COGDELL: We did, Your Honor.

THE COURT: The Court will also note for the record that Mr. Paxton was indicted on these cases back in July 28th of 2015; and the case was actually transferred here to Harris County on June 9th of 2017.

And after the transfer, some significant things took place, such as Hurricane Harvey; and the Court also -- well, the State filed a Motion for Continuance which was granted. So some things happened subsequent to the case being transferred here to Harris County.

With that being said, Defense counsel, you may proceed on your motion.

MR. COGDELL: Yes, sir.

And for the record, we are proceeding on Paxton's Motion to Set Aside Change of Venue as Void and Return Cases to Collin County. This latest literation of the motion was filed July

18th, 2019.

And as I mentioned at the bench, Judge, I'm going to keep this as succinct as possible. I know the Court has read the pleadings, and I think the issue is frankly quite simple.

The simple of it is that the judge who transferred the case to Harris County had no authority to do so. A judgment is void, as the pleadings point out, when it is apparent from the record that the Court rendering the judgment had no capacity to act as a Court.

Obviously we cite the *Paxton* matter herein. Judge Gallagher, who as the Court will recall, was the initial judge assigned to the case. His assignment ended on 12-31-16. As you can see by the exhibit, which is included as an attachment to the motion, Judge Evans assigned -- this was actually an extension. Judge Evans extended Judge Gallagher's jurisdiction for a period of 366 days beginning January 1, 2016.

The timeline is pretty straightforward. Judge Gallagher was originally assigned to the case until 12-31-15. On 1-1-2016, the assignment is extended until 1-1-2017.

On January 2nd, 2017, Judge

Gallagher's assignment ended. Two months after that or almost three months after that, on March 30th, 2017, Judge Gallagher grants the State's Motion For a Change of Venue and sent the matter to Harris County.

We found out about the expiration of Judge Gallagher's jurisdiction and filed an objection on May 10th of 2017. After refusing to step down, under Article 31, which is the change of venue procedure under the Code of Criminal Procedure -- the change of venue provision under the Code of Criminal Procedure, the Court of Appeals removed Judge Gallagher.

On July 8th, 2019, we re-urged and re-pled the objections to the judge's order. But here's the punch line: Anything after January 2nd, 2017, those orders are void and subject to reversal. This is not a new concept.

Contempt order was void because of an expired assignment. That's *In re Eastland* that we cited in the pleading. Similar contempt judgment was void and was outside of visiting judge's assignment, *In re Nash*, again as cited in the pleadings.

A similar order was void outside

the scope of the judge's assignment, *In re B.F.B.*, Texarkana, 2000 case, again cited in the brief. The judgment is void when the Court had no capacity to act.

The simple of it is the judge who transferred the cases to Harris County had no authority to do so, period, full stop. This is a Collin County case. It belongs back in Collin County.

Unless the Court has specific questions, I yield the floor to presumably Mr. Wice.

THE COURT: Okay. State, you may proceed.

MR. WICE: Thank you, Mr. Cogdell.

May it please the Court, Defense counsel, General Paxton.

I have no PowerPoint, Judge, and I had a lot more and that's all gone with the wind.

I think we can distill this case to its least common denominator and that's preservation because the cases that the Defense relies upon -- and make no mistake, they say what they say -- are civil cases and the Court of Criminal Appeals in *Wilson vs. State*, which they rely on, says the rules are different in criminal cases as regards this very

issue than they are in civil cases.

And, in fact, the Beaumont Court of Appeals in *Nash* recognized that in a footnote where it said the rule in criminal cases is X and the rule in civil cases is Y and that's why in a civil case we're bound by the Texas Supreme Court's ruling in *Eastland*. Unhappily for the Defense this is a criminal case where *Wilson* trumps the holding in *Eastland* and *Nash* and the other cases they relied upon.

And, in fact, it's rare if ever that I quote Presiding Judge Sharon Keller; but in her concurring opinion in *Wilson*, she says, "I agree with the majority that the expiration of a retired judge's assignment does not render a conviction void."

And I guess at one point in their motion, which was well-drafted, they maintain that it was nonsensical for the Defense to have gone to Judge Gallagher to question his ability to sit when, in fact, they believe he had no ability to sit.

And unfortunately the Court of Criminal Appeals says that's not so. Because in *Wilson*, a judge who spent decades in this courthouse, Bob Burdette, had been assigned to hear

a particular case. His assignment had apparently lapsed. There was no contemporaneous trial objection, and the Court of Criminal Appeals said if you want to raise it, you have to raise it in trial.

Now, they've raised it in trial; but what I think this Court needs to understand, because this is critical, nobody is questioning the facts. And even assuming that Judge Gallagher's assignment had expired, fundamental concepts of preservation of error and procedural default say it's not just that you make an objection. It's got to be timely.

When is it timely? Well, the cases that we cite that they don't think are on point say that an objection is timely when it's made as soon as the basis for the complaint becomes apparent. And whether it's evidenced at trial or anything else in a pretrial context, they knew or should have known with the exercise of reasonable diligence -- and these are great lawyers over here, for the record -- that his assignment had in their estimation lapsed in January; but they don't do anything at all until May. And not only don't they do anything at all, they continue to participate in these proceedings. They participate in half a dozen

conference calls. They came to town for a conference, logistical meeting, in the civil courthouse. But more importantly, Your Honor, they participated in a two-day hearing on the change of venue before Judge Gallagher. And why does that matter? Because they can't lay behind the log at that point. Maybe they believe Judge Gallagher would deny the motion.

At the end of the day, though, they knew in January. They continued to participate. The basis of the objection was apparent, and they didn't raise it. That's just fundamental error preservation.

The other thing I think that's important is that when they finally do raise it, they filed a Motion to Return Venue to Collin County, and they don't address that motion to Judge Gallagher. They address it to the regional -- then Regional Administrative Judge Mary Murphy, and the next day Mary Murphy sends them an e-mail where she basically says -- and I'm going to read it because there's been some question about the content -- "I'm in receipt of the objections and motion to return the case to the 416th District Court." That's in Collin County, Your Honor. "It is the trial court's

and subsequently the appellate court's role to rule on objections to jurisdiction. The undersigned does not have that power is the regional presiding judge."

And I apologize for not having attached this e-mail to our motion; but in truth and in fact, it's already in the record because this e-mail appears, I believe, as Appendix Tab 20 in their mandamus that they successfully urged to the Dallas Court of Appeals.

The mandamus is important, Judge, because there's good news and bad news for the Defense. The good news is they were able to remove Judge Gallagher, but the bad news is that the Dallas Court of Appeals makes it clear -- and I'm quoting from Headnote 5 in the Westlaw opinion -- "Respondent" -- Judge Gallagher -- "Respondent's authority to act expired when the venue order became final. Consequently, Respondent's" -- Judge Gallagher -- "appointment also terminated at that time."

So it's pretty clear-cut, Judge. Even on the merits the Courts of Appeals rejects their contention; and regardless of what happens on the merits, any claim, even constitutional claims,

as this Court knows having been on this bench for as long as it has, can be waived by the failure not just to object but to timely object.

And I would only point out in passing -- oh, the cases they cite, *Kirk* and *Suniga*, they basically say this Court has the ability to revisit any ruling that it wants to, not that it should, but that it can; and I don't think that's breaking news.

Finally, if this Court were to grant their motion, it would only add additional time, energy, and drama to this case because the Defense recognizes, correctly to their credit, that the State would be able to file a mandamus of this Court's order returning these cases to Collin County based on this discreet issue. And if that's the case, the mandamuses would be filed here, not in the Fifth Court of Appeals; and I can assure you based on my experience that that's a process that will add to and not subtract from the half-life of this case.

We ask this Court based upon preservation or lack thereof and failing on the merits as the Dallas Court of Appeals found it *In re Paxton* to deny their motion.

THE COURT: Okay. Defense, would

you like an opportunity to respond about the *Woodrow Wilson* State case out of the Court of Criminal Appeals? Have you guys had a chance to review that?

MR. COGDELL: They haven't cited that case in their briefs, Your Honor.

THE COURT: Oh, okay.

MR. WICE: No. I think *Wilson* -- I apologize. *Wilson* is cited in their pleading. I'm sorry if I didn't make that clear.

THE COURT: Okay. Because that -- that is a case out of the Court of Criminal Appeals.

MR. COGDELL: Yeah, Judge, we -- we addressed the *Wilson* case in our reply to their response.

THE COURT: Okay. So that's already in your motion?

MR. COGDELL: It is.

THE COURT: Okay.

MR. COGDELL: It is.

THE COURT: All right. All right. So you don't have anything further you want to add to that --

MR. COGDELL: No, sir.

THE COURT: The motions -- okay. The State --

MR. COGDELL: But I do have a brief rejoinder.

To be clear, Judge, the mandamus was not about Gallagher's losing jurisdiction. We never argued that in the mandamus. The mandamus was based upon Judge Gallagher's refusal to step aside from the case after he granted the change of venue.

Chapter 31 or Article 31 of the Code of Criminal Procedure is clear that if a judge grants a change of venue, he may not stay on the case absent the consent of the parties. We did not consent to Judge Gallagher remaining on the case and that's what the mandamus was and that's what the Court of Criminal Appeals was.

So don't misunderstand Mr. Wice's argument to suggest that the Court of Criminal Appeals has already ruled on this issue. They have not because that was not the issue at hand.

Thing No. 2, in their pleadings they argue two things. No. 1, that it's *Res Judicata* which --

MR. WICE: Which I will withdraw today, Your Honor.

THE COURT: Okay. All right.

MR. COGDELL: Good move because

it's not *Res Judicata*.

Second, they argue waiver. We haven't waived anything. Judge Gallagher lost jurisdiction when his appointment expired, full stop. Mr. Wice cites a number of cases that deal with preservation of error for appeal purposes, specifically the *Garza* case and the *Geuder* case.

The *Garza* case dealt with the need to object to witnesses' trial testimony when a Motion to Suppress was carried with trial. The *Geuder* case dealt with whether or not error was preserved by a Motion in Limine. It has nothing to do with this issue. We haven't waived anything. We're raising it before this Court, and we're doing so timely. There has been no waiver. There has been no concession. There has been no anything other than pursuing the relief that we're entitled to.

It's pretty clear, Judge. Judge Gallagher's appointment expired. After his appointment expired, he granted a change of venue. That change of venue is void because he did not have jurisdiction. We didn't wait to raise it on appeal. We are raising it now, and it's proper.

Thank you.

THE COURT: Okay.

MR. MATEJA: Your Honor, may I say one thing? Or I can give this to Mr. Cogdell.

THE COURT: Yes, go ahead. Go ahead.

MR. MATEJA: The very first question you asked about was on the *Wilson* case.

THE COURT: Right. Which is --

MR. MATEJA: The *Wilson* case --

THE COURT: Okay. Go ahead.

MR. MATEJA: In that case, as Mr. Wice pointed out, they held that a person who has been convicted may not then later challenge the conviction based on the lack of jurisdiction by the Court; but the Court, it took great pains to make sure that you can raise an objection pretrial. I'm just going to read you the language. It's pretty simple.

THE COURT: So you're saying you can't raise it for the first time on appeal?

MR. MATEJA: That's right.

THE COURT: Go ahead. Go ahead.

MR. MATEJA: So the Court said in that case, "How then may a defendant challenge the authority of a trial judge who is otherwise

qualified to preside pursuant to an expired assignment? We hold that such a defendant, if he chooses, may object pretrial. If he does not, he may not object later or for the first time on appeal."

THE COURT: Uh-huh. Thank you.

MR. COGDELL: Just to be clear, Judge, that's on Page 3 of our reply to the State's response. You've got that, that very language before you.

THE COURT: I do. Okay. Okay. Thank you.

MR. COGDELL: Yes, sir.

THE COURT: Thank you.

MR. WICE: And to be fair, Your Honor, Mr. Mateja, for whom I have great respect, should have kept reading the next sentence: "A timely objection in the trial court will afford both the trial judge and the State notice of the procedural irregularity and adequate opportunity to take corrective action."

If Judge Gallagher's assignment lapse is void, we're done. That's it. Let's go have cocktails. But it's not because that's the civil rule. That's *Eastland*. That's *Nash*. And

those are civil cases. *Wilson* -- and I invite the Court to read the entire opinion -- says that's not the rule in criminal cases. That that issue is voidable and because it's voidable it's subject to procedural default and that means that it's not just an objection in the trial court but a timely objection as soon as the complaint becomes apparent. That's why we cite *Geuder* and *Garza*, and it doesn't change the character merely because they happen to deal with other evidentiary issues.

MR. MATEJA: May I say one thing in response to that point?

THE COURT: Yes, please, please.

MR. MATEJA: So I think it's important and instructive for the Court to know kind of the timing of how things went down.

So we filed in May of '17 our objection to Judge Gallagher based on his lack of jurisdiction given his assignment. Okay.

THE COURT: Uh-huh.

MR. MATEJA: Judge Mary Murphy, who is the administrative judge, basically says that the judge has to decide that. I can't decide that. Okay. But then our challenge was is that Gallagher no longer really had jurisdiction over the cases

because he transferred venue.

So we filed the mandamus. It goes in front of the Dallas Court of Appeals. They agree with us that Judge Gallagher can't decide any questions. So Judge Murphy was basically sending it back to a judge who didn't have authority to decide it.

So it was important for us to follow that path, to do the mandamus. The mandamus issues. Judge Gallagher no longer has authority. The case is transferred here. It's now in front of you, and you are the proper judge to determine that objection.

We only became aware of his lack of authority at the time that we filed the objection. You know, that's not one of those things as lawyers that you go kind of digging through the records to determine whether or not he had been reassigned because actually there were multiple assignments. But I think Mr. Wice --

MR. WICE: Your Honor, I hate to interrupt Mr. Mateja --

THE COURT: Okay. One -- one at a time. One at a time, please.

MR. MATEJA: I would like to

finish.

MR. WICE: But there's no evidence of that.

THE COURT: I'll give you a chance to respond.

MR. WICE: Okay.

MR. MATEJA: I just need to --

THE COURT: Let's not interrupt each other. Go ahead.

MR. MATEJA: But the important thing is that Mr. Wice during his statement said that we knew as of January of 2017 that he lacked authority, and there is no evidence of that because it's just not true. We -- when we found out about it, we put together the objection. We filed it. Judge Murphy kicks it to Judge Gallagher who no longer had authority because he had transferred the case supposedly. So we do what we're supposed to be doing. Okay. And, again, you can't waive what you don't know; and we didn't know at the time. So we have followed all of the procedures.

And the most important thing to take away from all of this, Your Honor, is the fact that basically the State concedes that we're right. Now they're just arguing that we waived it. Okay.

So that's really important.

So unless you find that there is a waiver, you must, based on their concession, transfer the case back to Collin County; and we would submit to you that there hasn't been a waiver for all those reasons I just laid out.

THE COURT: Okay. Thank you.

Go ahead.

MR. WICE: Your Honor -- and I'm sorry to have interrupted you, Mr. Mateja.

MR. MATEJA: That's all right.

MR. WICE: There's no evidence in this record as to what they knew and when they knew it. That's just incorrect. And the Rules of Appellate Procedure say that it's their burden to bring forward a record sufficient to show reversal or relief.

So we don't know what they knew and when they knew it but that's irrelevant because it's their burden and they either knew or should have reasonably known with the exercise of reasonable diligence that the assignment in their estimation had lapsed.

We're not conceding anything at all except that the facts are stubborn things, and they

speak for themselves. But I think what this Court needs to recognize is that the mandamus is a defining moment for two reasons. No. 1, as we've pointed out, in their successful attempt to get Judge Gallagher removed, there was nothing that could have kept them from also challenging the venue ruling based upon the assignment having lapsed; and that to me is yet an additional chapter in the saga of waiver.

But, again, I haven't heard anything today, before I sit down, that attempts to diffuse or distinguish again the last sentence in this opinion that says Respondent's authority to act expired when the venue order became final. Consequently, Respondent's appointment also terminated at that time.

That's not Wice on the criminal law, Your Honor. That's the Court of Appeals and *Ex parte Paxton*; and we ask for that reason, that nobody's had a chance to diffuse or distinguish, to deny the motion.

THE COURT: Okay.

MR. COGDELL: Just one last comment, Your Honor.

THE COURT: Okay.

MR. COGDELL: A waiver is an intentional knowing or relinquishment of a known right. There has been no waiver in this case. If we didn't bring it before the Court's attention before a jury returned a verdict knowing that Gallagher's appointment had expired, certainly that is not waiver. That is the opposite of waiver. We are bringing this to the Court's attention, filing briefs on it and arguing it. This is the anti-waiver. This is anything but a waiver.

So Mr. Wice, brilliant as he is, continues to confuse preservation for appellate purposes and arguing that us failing to bring it to Judge Gallagher's attention earlier is a waiver; and he can't have it both ways. Mr. Wice can't say that we knew in January of '17 -- and there's no evidence of when we knew. I'm telling you as an officer of the court standing here in good faith we found out in May. If you want to take testimony on that, I'm happy to have Phil, who I think actually discovered this, testify.

But the point of it is we didn't know until May. We couldn't have raised it earlier. We didn't raise it because we were following the protocol as outlined by Mr. Mateja; and Gallagher's

jurisdiction, his assignment ended January 2nd, 2017. The motion is -- for change of venue is granted in March, and he's removed by the Court of Criminal Appeals on a completely unrelated issue in May.

So with that, I think we've beat this dead horse.

THE COURT: Okay. Anything further?

MR. WICE: As they say in Congress, I yield the remainder of my time.

THE COURT: Okay. Okay. Well, the Court is not going to make a ruling on this at this particular time. I'm going to probably rule on it sometime in January.

Why don't we go off the record and you guys pick a date that works for you, like, around the mid to latter part of January.

(Off the record.)

THE COURT: We're back on the record.

This hearing is in recess until January the 29th of 2020, at 3:00 p.m.

Is that your understanding, State?

MR. WICE: It is, Your Honor.

MR. SCHAFFER: It is.

THE COURT: Is that your understanding, Defense?

MR. COGDELL: It is.

THE COURT: Okay. Thank you.

MR. COGDELL: Thank you.

(Off the record.)

(Proceedings adjourned.)

THE STATE OF TEXAS :

COUNTY OF HARRIS :

I, LINDA HACKER, Official Court Reporter in and for the 177th District Court of Harris County, Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open Court or in Chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $_____ and was paid or will be paid by Harris County.

WITNESS MY OFFICIAL HAND on this the 18th day of December, 2019.

/s/ Linda Hacker
LINDA HACKER, CSR No. 4167
Expiration Date: 1-31-21
Official Court Reporter
177th District Court
201 Caroline, 13th Floor
Houston, Texas 77002
832-927-4250

APPENDIX TAB 13

Nos. 1555100, 1555101, 1555102

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
V.	§	177th JUDICIAL DISTRICT
	§	
WARREN KENNETH PAXTON, JR.	§	HARRIS COUNTY, TEXAS

ORDER

Paxton's Motion to Set Aside Change of Venue as Void and Return Cases to Collin County, Texas should be GRANTED. It is therefore:

ORDERED that the order of Judge Gallagher changing venue is hereby SET ASIDE and VACATED; it is further

ORDERED that the entire case files for the above-referenced causes shall be returned to the District Clerk of Collin County, Texas; ~~it is further~~

~~ORDERED that all future proceedings in these cases shall be presided over by the Hon. Andrea Stroh Thompson, Presiding Judge of the 416th District Court of Collin County, Texas, for further proceedings consistent with this Order~~.

IT IS SO ORDERED.

DATED this 25 day of JUNE 2020

THE HON. ROBERT JOHNSON
PRESIDING JUDGE 177TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS

APPENDIX TAB 14

COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS AT HOUSTON

ORDER

Appellate case name: In re The State of Texas Ex Rel. Brian W. Wice

Appellate case number: 01-20-00477-CR; 01-20-00478-CR; 01-20-00479-CR;

Trial court case number: 1555100, 1555101, 1555102

Trial court: 177th District Court of Harris County

Relator, Brian W. Wice, has filed a petition for writ of mandamus (1) challenging an order signed by the 17th District Court of Harris County on June 25, 2020 vacating a change of venue order in the underlying cases and returning venue of the cases to Collin County; and (2) compelling rulings on certain motions. In conjunction with the petition, Wice filed a motion to stay enforcement of the June 25, 2020 order returning venue in the underlying cases to Collin County. On July 2, 2020, this Court ordered real party in interest, Warren Kenneth Paxton, Jr., to file a response to the stay motion within 7 days and a response to the mandamus petition within 20 days. On the same day, Paxton filed a combined response to the stay motion and a motion to dismiss the mandamus petition for lack of jurisdiction.

After due consideration, the Court (1) **denies** Paxton's motion to dismiss the mandamus petition for lack of jurisdiction and (2) **grants** Wice's request to stay enforcement of the June 25, 2020 order returning venue in the underlying cases to Collin County. Accordingly, enforcement of the June 25, 2020 order is ordered stayed until the mandamus petition in this Court is finally decided or the Court otherwise orders the stay lifted. *See* TEX. R. APP. P. 52.10(b). Any party may file a motion for reconsideration of the stay. *See* TEX. R. APP. P. 52.10(c).

Paxton's response to the mandamus petition is extended to **20 days from the date of this order**. As stated in this court's prior order, Paxton's response to the petition must address Wice's challenges to the June 25, 2020 order, but need not address Wice's request to compel rulings. In particular, the Court requests that Paxton address the arguments on pages 25 to 31 of the petition, asserting that Judge Gallgher could exchange benches and preside over the 416th District Court of Collin County without an appointment order.

It is so ORDERED.

Judge's signature: /s/ Gordon Goodman
Acting individually

Date: July 7, 2020

APPENDIX TAB 15

COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS AT HOUSTON

ORDER OF ABATEMENT

Appellate case name: In re The State of Texas Ex Rel. Brian W. Wice

Appellate case number: 01-20-00477-CR; 01-20-00478-CR; 01-20-00479-CR;

Trial court case number: 1555100, 1555101, 1555102

Trial court: 177th District Court of Harris County

On June 30, 2020, relator, Brian W. Wice, filed a petition for writ of mandamus (1) challenging a June 25, 2020 order signed by the Honorable Robert Johnson, Presiding Judge of the 177th District Court of Harris County, vacating a change of venue order in the underlying cases and returning venue of the cases to Collin County; and (2) compelling rulings on certain motions.

After the mandamus petition was filed, relator subsequently informed this Court that (1) Judge Johnson voluntarily recused himself from the underlying cases on July 6, 2020, and (2) the cases were reassigned on July 15, 2020 to the Honorable Jason Luong of the 185th District Court. Although relator has not filed a motion requesting abatement of this original proceeding, relator's filing notifying the Court of these developments "advises" that abatement is appropriate under the circumstances.

When a mandamus petition complains of actions taken by a trial judge who subsequently recuses, appellate courts have the discretion to either deny the petition or to abate the case and allow the successor judge to consider the issues raised in the petition. *See In re Blevins*, 480 S.W.3d 542, 544 (Tex. 2013). Our decision should be based on a determination of "which of the two approaches affords the better and more efficient manner." *Id.* We conclude that the better and more efficient approach in these original proceedings is to abate.

Accordingly, we ABATE these original proceedings for **45 days** from the date of this order to allow Judge Luong to reconsider the challenged order and, if appropriate, to consider the pending motions. Judge Luong is directed to take whatever actions and hold whatever hearings he determines are necessary to consider the matters herein. A supplemental clerk's record containing any rulings, along with a reporter's record of any hearings held, shall be filed within **45 days** from this order. We withdraw our request that real party in interest file a response to the mandamus petition.

It is so ORDERED.

Judge's signature: /s/Gordon Goodman
Acting for the Court

Date: July 28, 2020

Panel consists of Justices Goodman, Hightower, and Countiss.

APPENDIX TAB 16

CAUSE NO. 1555100

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
WARREN KENNETH PAXTON, JR.	§	185th JUDICIAL DISTRICT

ORDER ON RECONSIDERATION OF PRIOR ORDER VACATING ORDER OF TRANSFER TO HARRIS COUNTY, TEXAS

On July 28, 2020, the First Court of Appeals abated a pending mandamus to allow the 185th District Court to consider any challenged orders and pending motions and to provide a supplemental clerk's record.

This Court, in accordance with that directive, issues the following:

On March 30, 2017, Judge George Gallagher, sitting in the 416th District Court of Collin County, Texas, entered an Order granting the State's Motion to Transfer Venue and transferred venue for the above-identified case to an appropriate adjoining district. The case was ultimately transferred to Harris County, Texas.

On June 25, 2020, Judge Robert Johnson entered an order setting aside and vacating the 416th District Court's prior order transferring venue.

The case was subsequently transferred from Judge Robert Johnson's court to the 185th Judicial District Court.

This court finds that its plenary jurisdiction to review the June 25, 2020 has expired.

The June 25, 2020 order effectively transferred the case back to Collin County, Texas, and jurisdiction immediately and automatically vests in the transferee court—that is, the 416th District Court of Collin County, Texas. The order of abatement and request for reconsideration was issued on July 28, 2020.

Accordingly, this Court is without jurisdiction to review the challenged order or any pending motions in these cases.

In the alternative, if it is determined by the First Court of Appeals, or by any other or higher appellate court that the 185th Judicial District Court does have jurisdiction to review and reconsider the June 25, 2020 Order, it is the Court's finding that Judge Gallagher was without jurisdiction to enter the March 30, 2017 order, that the March 30, 2017 order and related venue orders should be set aside, and that the Harris County District Clerk's file should be transferred to the Collin County District Clerk.

Signed this the 23rd Day of October, 2020.

Judge Jason Luong

CAUSE NO. 1555101

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
WARREN KENNETH PAXTON, JR.	§	185th JUDICIAL DISTRICT

ORDER ON RECONSIDERATION OF PRIOR ORDER
VACATING ORDER OF TRANSFER TO HARRIS COUNTY, TEXAS

On July 28, 2020, the First Court of Appeals abated a pending mandamus to allow the 185th District Court to consider any challenged orders and pending motions and to provide a supplemental clerk's record.

This Court, in accordance with that directive, issues the following:

On March 30, 2017, Judge George Gallagher, sitting in the 416th District Court of Collin County, Texas, entered an Order granting the State's Motion to Transfer Venue and transferred venue for the above-identified case to an appropriate adjoining district. The case was ultimately transferred to Harris County, Texas.

On June 25, 2020, Judge Robert Johnson entered an order setting aside and vacating the 416th District Court's prior order transferring venue.

The case was subsequently transferred from Judge Robert Johnson's court to the 185th Judicial District Court.

This court finds that its plenary jurisdiction to review the June 25, 2020 has expired.

The June 25, 2020 order effectively transferred the case back to Collin County, Texas, and jurisdiction immediately and automatically vests in the transferee court—that is, the 416th District Court of Collin County, Texas. The order of abatement and request for reconsideration was issued on July 28, 2020.

Accordingly, this Court is without jurisdiction to review the challenged order or any pending motions in these cases.

In the alternative, if it is determined by the First Court of Appeals, or by any other or higher appellate court that the 185th Judicial District Court does have jurisdiction to review and reconsider the June 25, 2020 Order, it is the Court's finding that Judge Gallagher was without jurisdiction to enter the March 30, 2017 order, that the March 30, 2017 order and related venue orders should be set aside, and that the Harris County District Clerk's file should be transferred to the Collin County District Clerk.

Signed this the 23rd Day of October, 2020.

Judge Jason Luong

CAUSE NO. 1555102

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
WARREN KENNETH PAXTON, JR.	§	185th JUDICIAL DISTRICT

ORDER ON RECONSIDERATION OF PRIOR ORDER VACATING ORDER OF TRANSFER TO HARRIS COUNTY, TEXAS

On July 28, 2020, the First Court of Appeals abated a pending mandamus to allow the 185th District Court to consider any challenged orders and pending motions and to provide a supplemental clerk's record.

This Court, in accordance with that directive, issues the following:

On March 30, 2017, Judge George Gallagher, sitting in the 416th District Court of Collin County, Texas, entered an Order granting the State's Motion to Transfer Venue and transferred venue for the above-identified case to an appropriate adjoining district. The case was ultimately transferred to Harris County, Texas.

On June 25, 2020, Judge Robert Johnson entered an order setting aside and vacating the 416th District Court's prior order transferring venue.

The case was subsequently transferred from Judge Robert Johnson's court to the 185th Judicial District Court.

This court finds that its plenary jurisdiction to review the June 25, 2020 has expired.

The June 25, 2020 order effectively transferred the case back to Collin County, Texas, and jurisdiction immediately and automatically vests in the transferee court—that is, the 416th District Court of Collin County, Texas. The order of abatement and request for reconsideration was issued on July 28, 2020.

Accordingly, this Court is without jurisdiction to review the challenged order or any pending motions in these cases.

In the alternative, if it is determined by the First Court of Appeals, or by any other or higher appellate court that the 185th Judicial District Court does have jurisdiction to review and reconsider the June 25, 2020 Order, it is the Court's finding that Judge Gallagher was without jurisdiction to enter the March 30, 2017 order, that the March 30, 2017 order and related venue orders should be set aside, and that the Harris County District Clerk's file should be transferred to the Collin County District Clerk.

Signed this the 23rd Day of October, 2020.

Judge Jason Luong

APPENDIX TAB 17

COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS AT HOUSTON

AMENDED ORDER ON MOTION FOR RECONSIDERATION EN BANC

Cause numbers: 01-20-00477-CR, 01-20-00478-CR, and 01-20-00479-CR

Style: *In re The State of Texas ex rel. Brian W. Wice, Relator*

Type of motion: Motion for reconsideration en banc

Party filing motion: Relator

IT IS ORDERED that the motion for reconsideration en banc is **denied**. The temporary stay imposed on June 15, 2021 is **lifted**.

Judge's signature: /s/Julie Countiss
Acting for the En Banc Court

Date: September 9, 2021

*En banc court consists of Chief Justice Radack and Justices Kelly, Goodman, Landau, Hightower, Countiss, Rivas-Molloy, and Guerra. Justice Farris not participating.

Goodman, J., dissenting from the denial of en banc reconsideration for reasons stated in his concurring and dissenting opinion.

Guerra, J., dissenting from the denial of en banc reconsideration with separate opinion.

APPENDIX TAB 18

FILE COPY

TEXAS COURT OF CRIMINAL APPEALS

Austin, Texas

CORRECTED

M A N D A T E

THE STATE OF TEXAS,

TO THE 416TH DISTRICT COURT OF COLLIN COUNTY GREETINGS:

Before our **COURT OF CRIMINAL APPEALS**, on **NOVEMBER 21, 2018**, the cause upon an Original Application for Writ of Mandamus styled:

IN RE STATE OF TEXAS EX REL. BRIAN W. WICE, RELATOR

CCRA No. **WR-86,920-02**

Tr. Ct. No. **416-81913-2015; 416-82148-2015; 416-82149-2015**

was determined; and therein our said **COURT OF CRIMINAL APPEALS** made its order in these words:

"This cause came on to be heard on the Original Application for Writ of Mandamus , and the same being considered, it is **ORDERED, ADJUDGED AND DECREED** that RELIEF IS **DENIED**, in accordance with the opinion of this Court, and that this decision be certified below for observance."

Motion for Rehearing denied June 19, 2019.

WHEREFORE, We command you to observe the order of our said **COURT OF CRIMINAL APPEALS** in this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, THE HONORABLE SHARON KELLER, Presiding Judge

of our said **COURT OF CRIMINAL APPEALS**, with the Seal thereof

Annexed, at the City of Austin,

on this day **Wednesday, June 19, 2019.**

Deana Williamson

DEANA WILLIAMSON, Clerk

FILE COPY

COURT OF CRIMINAL APPEALS

P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

Wednesday, June 19, 2019

5th Court Of Appeals Clerk
Lisa Matz
600 Commerce, 2nd Floor
Dallas, TX 75202
* Delivered Via E-Mail *

Brian Wice
440 Louisiana, Suite 900
Houston, TX 77002
* Delivered Via E-Mail *

Re: In Re State Of Texas Ex Rel. Brian W. Wice, Relator
CCA No. WR-86,920-02
COA No. 05-17-00634-CV; 05-17-00635-CV; 05-17-00636-CV
Trial Court Case No. 416-81913-2015; 416-82148-2015; 416-82149-2015

The Court of Criminal Appeals has this day issued the mandate in the above-referenced and styled case number. The mandate will be transmitted electronically only.

Sincerely,

Deana Williamson

Deana Williamson, Clerk

cc: Presiding Judge 416th District Court (Delivered Via E-Mail)
Presiding Judge 177th District Court (Delivered Via E-Mail)
District Clerk Harris County (Delivered Via E-Mail)
District Attorney Collin County (Delivered Via E-Mail)
Christine Baldwin (Delivered Via E-Mail)
Bryan Hillary Burg (Delivered Via E-Mail)
Dan Lamar Cogdell (Delivered Via E-Mail)
Nicole Wignall Deborde (Delivered Via E-Mail)
Philip H. Hilder (Delivered Via E-Mail)
William B. Mateja (Delivered Via E-Mail)
Kent A. Schaffer (Delivered Via E-Mail)
Clyde Moody Siebman (Delivered Via E-Mail)

APPENDIX TAB 19

NO. _____

IN THE COURT OF APPEALS
FOR THE FIRST/FOURTEENTH JUDICIAL DISTRICT
AT HOUSTON, TEXAS

IN RE THE STATE OF TEXAS EX REL. BRIAN W. WICE, RELATOR.

ANCILLARY TO
STATE OF TEXAS V. WARREN KENNETH PAXTON, JR.
CAUSE NOS. 1555100, 1555101, 1555102

RELATOR'S PETITION FOR WRIT OF MANDAMUS

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COLLIN COUNTY CRIMINAL DISTRICT ATTORNEYS *PRO TEM*
THE STATE OF TEXAS

ORAL ARGUMENT REQUESTED

> whole and considering the context in which the order was issued, we conclude that Judge Banner has authority, pursuant to Judge Ovard's assignment order, to hear the underlying cause on the merits.[93]

Viewed through this lens, as in *Richardson*, "The most reasonable reading of the substance of [Judge Murphy's] order within the context in which it was issued is that [Judge Gallagher] was assigned to hear this case when [Judge Oldner] recused himself."[94] As in *Richardson*, where the court found "the context in which the [appointment] order was issued" to be of paramount importance to its determination that the order invested the visiting judge with authority to hear the case, the context of the order issued in this case compels the identical result. Judge David Evans's order assigning Judge Gallagher to the Eighth Administrative Region for 366 days to hear the Paxton prosecution was signed on December 21, 2015.[95] By that time, Paxton had filed four pre-trial writs of habeas corpus and a series of other pre-trial motions that Judge Gallagher denied on December

---

[93] *Id.* at 830-31. (citation omitted)(emphasis added).

[94] *Id.*

[95] Tab 7 Exhibit D.

APPENDIX TAB 20

No. WR-92, 966-01

In the Texas Court of Criminal Appeals

In re STATE OF TEXAS,
Relator.

On Petition for Writ of Mandamus
to the 230th Judicial District Court, Harris County

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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Attorney General of Texas

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First Assistant Attorney General

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LANORA C. PETTIT
Principal Deputy Solicitor General

WILLIAM F. COLE
Assistant Solicitor General

Counsel for Relator

II. The District Court Clearly Abused Its Discretion by Granting the Application.

If the Court proceeds to the merits of the Petition, it should hold that the trial court clearly abused its discretion by issuing the writs of habeas corpus.

A. The Representatives cannot use the state habeas statute to circumvent the House's constitutional prerogative to compel their attendance.

The Representatives' Response depends on the fiction that they may rely on Texas's state habeas *statute*, Tex. Code Crim. Proc. Ann. art. 11.01 *et seq.*, to circumvent the Legislature's long-established *constitutional* prerogative to compel the Representatives' attendance at the special session, TEX. CONST. art. III, § 10. There is no merit to this contention. "[T]he Texas Constitution must take precedence over state statutes." *Salomon v. Lesay*, 369 S.W.3d 540, 557 (Tex. App.—Houston [1st Dist.] 2012). Thus, "when the proposed application of a state statute would abridge rights enshrined in the Texas Constitution, the statute must yield." *Id.* at 556-57 (citing *Weiner v. Wasson*, 900 S.W.2d 316, 318-19 (Tex. 2005)). Earlier this week, the Texas Supreme Court confirmed that Article III, section 10 of the Constitution empowers the House to "physically compel the attendance of absent members to achieve a quorum." *In re Abbott*, 2021 WL 3641471, at *2. Thus, because the Representatives' proposed application of the state habeas statute would run headlong into the House of Representatives' constitutional power to compel their attendance, "the statute must yield" to the extent of a conflict. *Salomon*, 369 S.W.3d at 557.

But there is no conflict—the criminal habeas statute that the Representatives invoke does not apply here. Typically, "habeas proceedings are categorized as

APPENDIX TAB 21

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-93,089-01

IN RE STATE OF TEXAS EX REL. BRIAN W. WICE, Relator

ON PETITION FOR A WRIT OF MANDAMUS
CAUSE NOS. 01-20-00477-CR, 01-20-00478-CR & 01-20-00479-CR
IN THE FIRST COURT OF APPEALS
HARRIS COUNTY

Per curiam.

O R D E R

Relator, the State of Texas, has filed a Motion to Stay Pending Disposition of a Petition for Writ of Mandamus in this Court.

The First Court of Appeals denied mandamus relief in the above-numbered causes. *In re State of Texas ex rel. Brian Wice*, __ S.W.3d __, Nos. 01-20-00477-CR, 01-20-00478-CR & 01-20-00479-CR (Tex. App.—Houston [1st Dist.] May 27, 2021). On September 9, 2021, the appellate court denied Relator's motion for reconsideration en banc and lifted its stay. Relator represents that he intends to file a mandamus petition in this Court challenging the appellate court's mandamus decision in the next 21 days.

In criminal law matters, this Court has power to issue writs of mandamus and prohibition. TEX. CONST. art. V § 5(c); TEX. CODE CRIM. PROC. art. 4.04 § 1. The Court and its Judges also have the power to issue such other writs as may be necessary to protect its jurisdiction. *Id.* Relator's motion is granted. The 185th District Court's October 23, 2020 order returning venue in to Collin County in Case Numbers 1555100, 1555101, and 1555102, is stayed pending further order of this Court. The Court's stay will be lifted if it does not receive Relator's mandamus pleadings within 21 days of this order.

Filed: September 15, 2021
Do not publish

APPENDIX TAB 22

FIRST COURT OF APPEALS

No. 01-20-00477-CR
No. 01-20-00478-CR
No. 01-20-00479-CR

In re State of Texas Ex Rel. Brian W. Wice

On Petition from the 177th District Court, Harris Co.
Nos. 1555100, 1555101, & 1555102

Real Party in Interest Paxton's Response to Relator's Motion for Reconsideration En Banc

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8. Contrary to Relator's arguments (Relator's Mot., 6-10), the facts and legal issues in *Paxton* are not "virtually identical" to those in this proceeding. The issue of whether Judge Gallagher had the authority to enter orders after issuing the change of venue order is not the same as whether he had authority to order the change of venue. There was no "second bite at the apple" as Relator alleges (Relator's Mot., 6) because there was no "first bite at the apple."

9. Relator purports to know what Mr. Paxton "consciously decided" since Relator claims that he "consciously decided to not raise this issue...in his original mandamus petition before venue was changed." (Relator's Mot., 4). This underlies Relator's law-of-the-case argument. However, this has no basis in fact. Relator fails to cite any record evidence corroborating this argument.

10. The record evidence shows that Judge Gallagher found that the agreement of the parties to transfer the cases to a county other than an adjoining one is not a waiver of Mr. Paxton's objections to the transfer of venue or any other defense objections (App.071). Further, Mr. Paxton filed the petition for writ of mandamus on May 15, 2017. Only five days earlier on May 10, 2017, he filed objections to all rulings made after the

assignment expired. (App.113). This objection was filed promptly after Mr. Paxton discovered that the appointment order had expired. The next day, Relator emailed Judge Gallagher stating: "The State respectfully requests a hearing on Mr. Paxton's 'objections' to be held in Harris County at the Court's earliest convenience consistent with the availability of all counsel." (App.150). Without giving Judge Gallagher a chance to consider the issue, mandamus would have been inappropriate. Even so, the law-of-the-case doctrine would not apply because the doctrine is only as it provides ("questions of law decided on appeal to a court of last resort govern the case throughout its subsequent stages on the same issue") and not as Relator argues. This Court should deny Relator's motion on the first ground.

2. There is no evidence supporting Relator's claim that Mr. Paxton was rewarded for "sandbagging the trial judge and regional administrative judges as to whether the trial judge's appointment order had lapsed..." by not timely objecting (direct response to Relator's Ground 2).

11. Mr. Paxton did not delay objecting to Judge Gallagher's expired assignment. The record evidence shows that Mr. Paxton objected shortly after he learned of it. The Order of Assignment dated December

an untimely notice of appeal. It was uncontested that the signed appealable order was placed in the clerk's record at some point between July 7 and September 25, 2014. From that point, the State was placed on *constructive notice* that the order granting the motion to suppress had been signed. The State had constructive notice since at the conclusion of the hearing on July 7, "the trial court plainly announced its intention to grant the motion, and the State could have exercised diligence to monitor the clerk's record for the filing of a signed order from that point forward." *Id.* "The State could have been far more proactive in protecting its right to appeal in this case" since in addition to monitoring the clerk's record after the court plainly announced its intention to grant the motion, the State could have filed its notice of appeal at any time after the trial court announced its intentions. *Id.* at 903-904.

17. Here, there was no actual, implied, or constructive notice. The Majority correctly concludes that "The State does not point out any specific event that should have triggered an inquiry into the terms of Judge Gallagher's assignment between January and May 2017." (Majority at 13). In fact, Relator cites no facts and instead makes baseless arguments of "sandbagging." Nor does Relator cite evidence supporting

that this was a "happenstance" discovery of the claim. (Relator's Mot., 10). Relator again pretends to know what Mr. Paxton was thinking just like in Ground 1, where Relator claims to know what Mr. Paxton "consciously decided" (Relator's Mot., 4). This Court should reject such baseless speculation.

18. Finally, Relator fails to address the fact that *before trial*, Mr. Paxton challenged Judge Gallagher's authority to preside under an expired assignment, which is all that is required to preserve the issue. (Majority at 14). The Majority cites *Wilson v. State*, 977 S.W.2d 379, 380 (Tex.Crim.App. 1998) (Majority at 14), where the TCCA held that a defendant may challenge the authority of a trial judge—who is otherwise qualified—to preside under an expired assignment by objecting *pretrial*.

19. To state the obvious, pretrial means *before trial*. It does not mean some date made up by the State before trial is set on the court's docket. Nor does it mean by a date that Relator believes it should be raised. This conclusion is supported by the TCCA's holding in cases like *State v. Hill*, 499 S.W.3d 853, 867 (Tex.Crim.App. 2016), where the Court held that to comply with Tex. Rule App. Proc. 33.1 (2021) requirement of timeliness, a claim must be raised and ruled upon *before trial*, and under

Tex. Code Crim. Proc. Art. 28.01 (2021), such claims or "preliminary matters" are considered at a pretrial hearing.

20. As the Majority concluded, "nothing in the record shows a lack of reasonable diligence in bringing the challenge." (Majority at 14). Thus, there was no abuse of discretion for the trial court to conclude that Mr. Paxton did not forfeit his challenge to Judge Gallagher's authority to order the change of venue. This Court should deny Relator's motion on the second ground.

3. The majority's holding that Tex. Const. Art. V, § 11 did not authorize an "exchange of benches" was correct because there was no "exchange of benches" and Mr. Paxton timely objected to Judge Gallagher's presiding after the assignment order expired. Relator's argument that the Court Administration Act is an "otherwise insignificant statute" is without merit (direct response to Relator's Ground 3).

21. There was no "exchange of benches." The expired assignment did not morph into an "exchange of benches." All that occurred is that under Tex. Gov. Code § 74.056(b), Judge Murphy—presiding judge of the First Administrative Judicial Region—assigned a judge from the Eighth Administrative Judicial Region: "[T]he presiding judge of one administrative region may request the presiding judge of another

administrative region to furnish judges to aid in the disposition of litigation pending in a county in the administrative region of the presiding judge who makes the request." Judge Evans consented to Judge Murphy's request to appoint Judge Gallagher but limited his authority to expire at 12:00 a.m. on January 2, 2017, since visiting judges are assigned to a case or for a period of time and not in perpetuity. *See In re Republic Parking Sys., Inc.*, 60 S.W.3d 877, 879 (Tex.App.-Houston [14th Dist.] 2001, no pet.). The Majority correctly stated the law, and it is clear what occurred here. (Majority at 15).

22. This expired assignment did not shapeshift into an "exchange of benches" without even an informal agreement merely because Relator wants this Court to believe it did. Nor was Judge Gallagher authorized to sit without an appointment order as Relator wants this Court to believe. (Majority at 17).

23. Mr. Paxton challenged Judge Gallagher's authority to continue to sit and proved through administrative records that his appointment had expired before Judge Gallagher ruled on the State's motion to change venue. (Majority at 18). Since Mr. Paxton objected to authority—which had expired—there was no "presumption" that Judge

Gallagher "was in regular discharge of his duties." (Majority at 18).

24. Thus, Mr. Paxton timely objected, and Judge Gallagher's appointment order had expired. There is no evidence of an agreement or discussion to "exchange benches." There is no evidence of an actual "exchange of benches." What Relator wants this Court to believe is that a judge—whether elected or appointed—can show up in another district and take the bench without an assignment or prior agreement to "exchange benches." Or, that judge can stay beyond the expiration of the assignment and despite an objection because it can be inferred from Tex. Const. Art. V, § 11, just like Relator claims a "clear inference" that Mr. Paxton's "silence" was "animated by his decision to roll the dice" on the issue of preservation of error. (Relator's Mot., 14). No such inference can be made here. Unless there is evidence that judges agree to exchange benches or that a party does not object to a judge presiding over a case beyond the expiration of an assignment, there is no "exchange of benches."

25. Tex. Const. Art. V, § 11 provides in part: "...And the District Judges may exchange districts or hold courts for each other *when they may deem it expedient* and shall do so when required by law. This

disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law." (emphasis added). "When they deem it expedient" indicates that there was a "meeting of the minds" for a valid "exchange of benches." There was no evidence of this.

26. Among other cases, Relator again cites *Moore v. Davis*, 32 S.W.2d 181 (Tex. 1930) (Relator's Mot., 19), arguing that it applies here since the right of district judges to exchange districts and hold court for each other "is provided for by Sec. 11 of Art. 5...and cannot be taken away by statute." Mr. Paxton never argued that a statutory provision overruled Tex. Const. Art. V, § 11. Mr. Paxton argues that there was never an exchange of benches, he objected timely, and the language "when they deem it expedient" shows that there must be an agreement to exchange benches.

27. Relator continues to ignore the logical conclusion that Judges Evans and Murphy would not have gone through the trouble of authorizing Judge Gallagher to sit by assignment if he could have merely "exchanged benches" with a district judge in Collin County. The assignment—that expired after January 1, 2017—was the only way for

Judge Gallagher to preside since there was no judge in Collin County with whom he could have agreed to "exchange benches." Judge Oldner recused himself on July 29, 2015. (App.001). Judges Gallagher and Oldner did not "exchange benches." An "exchange of benches" could have occurred only if another judge was assigned after Judge Oldner's recusal, then Judge Gallagher and this other judge agreed to exchange benches because "they deem(ed) it expedient." But this never happened. There was no other judge. Relator fails to explain how there could have been an "exchange of benches" between Judge Gallagher and a nonexistent judge because there was no such exchange, and Tex. Const. Art. V, § 11 does not apply.

28. Finally, Relator's arguments that the Court Administration Act—Chapter 74 of the Texas Government Code—is an "otherwise insignificant statute" are without merit. To refer to the Act as an "otherwise insignificant statute" is bizarre and must be a revelation to Texas judges and the Texas judicial system. When enacted in 1985, the Act's purpose was to "...provide a statewide framework for court administration and case management, in order to give the civil courts greater control over their dockets and speed the progress of

cases through the court system." *In re Canales*, 52 S.W.3d 698, 702-703 (Tex. 2001). The Act directs many other processes, including the rule that "retired and former judges may be assigned to hold court when necessary to dispose of accumulated business in [an administrative judicial] region. provided they meet the statutory requirements." *See, e.g.*, *Merlo v. Lopez*, No. 01-19-00102-CV, 2021 Tex.App.LEXIS 650, *21 (Tex.App.-Houston [1st Dist.] Jan. 28, 2021) (mem. op.). These and other parts of the Act do not reflect an "otherwise insignificant statute."

29. The only issue is whether Tex. Const. Art. V, § 11 applies, and as explained above and by the Majority, it does not. Obviously, the Court Administration Act does not override or displace Tex. Const. Art. V, § 11. It does not have to. Nothing in the Act prohibits an exchange of benches if it were a valid exchange. Merely because Relator finds no support in the Act for his claims does not render it an "otherwise insignificant statute," especially since Relator also fails to show how Tex. Const. Art. V, § 11 applies. This Court should deny Relator's motion on the third ground.

4. The Dissent's opinion about Tex. Const. Art. V, § 11 applying is incorrect.

30. Although Mr. Paxton has addressed the arguments in the Dissent, he again addresses the Tex. Const. Art. V, § 11 issue. As the Dissent concluded, "the majority's refusal to apply Article V, Section 11 is flawed. Gallagher's continued involvement in these cases after the expiration of his assignment was expedient and therefore authorized by our Constitution." (Dissent at 13). However, as explained above and by the Majority, Tex. Const. Art. V, § 11 does not apply because there was no exchange of benches—express or implied—and Mr. Paxton timely objected to Judge Gallagher signing the Gallagher-Order.

31. The Dissent agrees that Judge Gallagher lacked authority to act because he presided under a statutory assignment, and this statutory assignment expired before he entered the transfer order. This is where the analysis should end since there never was an "exchange of benches." However, the Dissent found that "the majority reaches the right result but does so for the wrong reasons," arguing that Judge Gallagher lacked authority "because the presiding judge of the First Region did not have any authority to assign Gallagher to sit in Collin County and hear these

cases under the plain language of the applicable statutes." (Dissent at 2-3). This part is correct. But the Dissent also argues (Dissent at 8-9):

> "[t]he assignment order before us—though expired—effectively reflects that the judges involved deemed it expedient for Gallagher to preside over these cases. This is enough to save Gallagher's transfer order, particularly given that Paxton did not object to Gallagher's continued involvement in the cases until after the order had been entered and more than five months after Gallagher's statutory assignment had expired..."

32. Mr. Paxton has explained in the original briefing and again here that he and his counsel were never given notice of the expiration of the assignment order as of January 2, 2017. There was no express notice. Nor was there any implied notice. Nor was there any constructive notice as was in *Wachtendorf*, 475 S.W.3d at 903. It is important to consider what constructive notice means: a person is "deemed to have actual knowledge of certain matters" and it "creates an irrebuttable presumption of actual notice." *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 887 (Tex. 1998). Neither Relator nor the Dissent argue that Mr. Paxton had an "irrebuttable presumption of actual notice" that Judge Gallagher's appointment had expired. Why? Because Mr. Paxton had no such "irrebuttable presumption of actual notice."

33. The Dissent bases its argument on Tex. Const. Article V, § 11. However, there was no authorization for Judge Gallagher to remain on the cases after January 2, 2017, express or implied. There was no "agreement" to exchange benches. To conclude otherwise would allow judges to transfer the venue of cases without authority.

5. It is Relator that failed to preserve error on his central arguments.

34. Relator makes unsubstantiated claims that Mr. Paxton is an "opportunistic defendant" who attempted to "sandbag a trial judge or the criminal justice system itself." (Relator's Mot., 20). Thus, per Relator, Mr. Paxton has manipulated the entire court system, starting with the trial court and now this Court. However, it is Relator that has acted in an "opportunistic" manner and is "sandbagging" the trial court and this Court. By arguing that the "otherwise insignificant statute" (the Court Administrative Act) should be trumped by Tex. Const. Art. V, § 11, Relator is really arguing that there is an irreconcilable conflict between the plain language of the Act and the Texas Constitutional provision.

35. When there is a conflict between the Constitution and a statute, a court should "...give full effect" to the Constitution and to

erroneous—for the first time. Mandamus may issue only when the mandamus record establishes: (1) a clear abuse of discretion or the violation of a duty imposed by law; and (2) the absence of a clear and adequate remedy at law. *Powell v. Hocker*, 516 S.W.3d 488, 494-495 (Tex.Crim.App. 2017); *Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985) (Mandamus is an extraordinary remedy that issues only to correct a clear abuse of discretion or where the court fails to observe a mandatory provision conferring a right or forbidding an action.).

37. Relator never argued in the trial court or here that the trial court abused its discretion by allowing an "otherwise insignificant statute" (the Act) trump Tex. Const. Art. V, § 11. Nor has Relator ever argued a variation of this. Instead, Relator asks this Court to ignore the Court Administrative Act in favor of Relator's incorrect interpretation Tex. Const. Art. V, § 11. By never raising this argument in the trial court or even now, Relator waived this argument.

38. For the same reasons, if Relator has waived any argument that the parts of the "otherwise insignificant" Act that he believes conflict with the Tex. Const. Art. V, § 11 are unconstitutional.

APPENDIX TAB 23

IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

FILED IN
5th COURT OF APPEALS
DALLAS, TEXAS
5/15/2017 7:00:22 PM
LISA MATZ
Clerk

No. _____

IN RE WARREN KENNETH PAXTON, JR., RELATOR

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause nos. 416-81913-2015,
416-82148-2015, 416-82149-2015

APPENDIX/RECORD IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND PROHIBITION AND REQUEST FOR EMERGENCY RELIEF

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State Bar No. 09620050
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Paul L. Creech
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APPENDIX TAB 1

THE STATE OF TEXAS

8th ADMINISTRATIVE JUDICIAL REGION

ORDER OF ASSIGNMENT BY THE PRESIDING JUDGE

Pursuant to Section 74.056, Texas Government Code, I assign the Honorable George Gallagher, District Judge of the 396TH Court to the

1st Administrative Judicial Region for reassignment by the Presiding Judge thereof.

The judge is assigned for a period of 157 days, beginning July 28th, 2015. If the judge begins a trial on the merits during the period of this assignment, the assignment continues in such case until plenary jurisdiction has expired or the undersigned Presiding Judge has terminated this assignment in writing, whichever occurs first.

IT IS ORDERED that the Clerk of the Court to which the assignment is made, if it is reasonable and practicable, and if time permits, give notice of this assignment to each attorney presenting a party to a case that is to be heard in whole or in part by the assigned judge.

IT IS FURTHER ORDERED that the Clerk, upon receipt hereof, shall post a copy of this order in a public area of the Clerk's office or courthouse so that the attorneys and parties may be advised of this assignment.

SIGNED July 28th, 2015

David W Evans

Presiding Judge,

8th Administrative Judicial Region of Texas

ATTEST:

Administrative Assistant

THE STATE OF TEXAS
FIRST ADMINISTRATIVE JUDICIAL REGION
ORDER OF ASSIGNMENT BY THE PRESIDING JUDGE

Pursuant to Section 74.056, Texas Government Code, I assign the:

Honorable George Gallagher

Active Judge of The 396th District Court

to the

416th District Court of Collin County, Texas

This assignment is for the cause(s) and style(s) as stated in the conditions of assignment from this date until plenary power has expired or the undersigned Presiding Judge has terminated this assignment in writing, whichever occurs first.

CONDITION(S) OF ASSIGNMENT

NOS. 416-81913-2015, 416-81914-2015, 416-81915-2015; State of Texas V. Warren Kenneth Paxton, Jr.

In addition, whenever the assigned Judge is present in the county of assignment for a hearing in the above cause(s), the Judge is also assigned and empowered to hear, at that time, any other matters presented for hearing.

It is ordered that the Clerk of the court to which this assignment is made, if it is reasonable and practicable and if time permits, give notice of this assignment to each attorney representing a party to a case that is to be heard in whole or in part by the assigned Judge.

SIGNED: July 29, 2015
Date

Mary Murphy
Mary Murphy, Presiding Judge
First Administrative Judicial Region of Texas

Assign# 25680

THE STATE OF TEXAS

8th ADMINISTRATIVE JUDICIAL REGION

ORDER OF ASSIGNMENT BY THE PRESIDING JUDGE

Pursuant to Section 74.056, Texas Government Code, the undersigned Presiding Judge assigns the Honorable George Gallagher, District Judge of the 396th District Court to the 1st Administrative Judicial Region of Texas, for reassignment by the Presiding Judge thereof.

The judge is assigned for a period of 366 days, beginning January 1, 2016. If the judge begins a trial on the merits during the period of this assignment, the assignment continues in such case until plenary jurisdiction has expired or the undersigned Presiding Judge has terminated this assignment in writing, whichever occurs first.

SIGNED this 21st day of December, 2015.

DAVID L. EVANS, PRESIDING JUDGE
EIGHTH ADMINISTRATIVE JUDICIAL REGION OF TEXAS

ATTEST:
Tracy Kemp,
Administrative Assistant

cc: Honorable George Gallagher
Honorable Mary Murphy
File

APPENDIX TAB 24

1555100 177th
1555101
1555102

P6

NOs. 416-81913-2015
416-82148-2015
416-82149-2015

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
V.	§	416th JUDICIAL DISTRICT
	§	
WARREN KENNETH PAXTON, JR.	§	COLLIN COUNTY, TEXAS

PAXTON'S OBJECTION TO RULINGS MADE BY JUDGE SITTING BY EXPIRED ASSIGNMENT AND MOTION TO RETURN CASE TO PRESIDING JUDGE OF THE 416TH DISTRICT COURT

TO THE HONORABLE MARY MURPHY, PRESIDING JUDGE OF THE FIRST ADMINISTRATIVE JUDICIAL REGION:

WARREN KENNETH PAXTON, JR. ("Paxton"), objects to void court rulings made by the Hon. George Gallagher, whose assignment to the First Judicial Administrative Region from the Eighth Judicial Administrative Region expired on December 31, 2016, prior to the commencement of any trial, and requests that: (1) rulings entered after December 31, 2016, be vacated and declared void, and (2) the cases be returned to the presiding judge of the 416th Judicial District Court since the voluntarily recused judge is no longer in office.

I. PROCEDURAL HISTORY[1]

Then presiding judge of the 416th District Court of Collin County, The Hon. Chris Oldner, voluntarily recused himself from this case on July 29, 2015. Ex. A; *See also* Tex. Govt. Code § 24.002.

Later that day, the Hon. Mary Murphy, Presiding Judge, First Administrative Judicial Region, assigned the Hon. George Gallagher, of the 396th District Court of Tarrant County, to hear these cases "until the plenary power has expired or the undersigned Presiding Judge has terminated this assignment in writing, whichever occurs first." Ex. B.[2]

Judge Gallagher was only available for assignment by Judge Murphy because he was previously assigned to her region pursuant to Tex. Gov't Code § 74.056(b) by order the Hon. David Evans, Presiding Judge of the neighboring Eighth Administrative Judicial Region of Texas. Judge Murphy specifically requested Judge Gallagher's inter-regional assignment on the morning of July 28, 2015, a calendar day ***before*** Judge Oldner's voluntary self-recusal. Ex. C.[3] Judge Evans renewed Judge Gallagher's inter-regional assignment for the calendar year of 2016,

[1] Paxton requests that the Presiding Judge take judicial notice of the records of First Administrative Judicial Region and the Clerk's record in these cases, however, relevant copies are provided as exhibits for convenience.

[2] The 396th Judicial District is limited to Tarrant County, which is part of the 8th Judicial Administrative Region. Tex. Gov't Code. §§ 24.541 and 74.042(i). "The 416th Judicial District is composed of Collin County" which is in the 1st Judicial Administrative Region. *Id* at § 24.560 and 74.042(b).

[3] A request for Judge Gallagher was emailed at 8:44 a.m. on July 28, 2015, to the 8th region. The Indictment was not returned until 4:05 p.m. that day.

but not thereafter. Ex. D.[4] Judge Gallagher's inter-regional assignment and lawful assignment to this case (which has yet to proceed to trial) automatically expired at midnight on December 31, 2016.

The newly elected presiding judge of the 416th District Court was sworn in a few days later.

II. CIRCUMSTANCES NECESSITATING ASSIGNMENT MOOT

The Honorable Chris Oldner did not seek re-election as presiding judge of the 416th District Court and his term in office expired on December 31, 2016. The Hon. Andrea Stroh Thompson was elected as the Presiding Judge of the 416th District Court on or about November 8, 2016, and sworn in on January 2, 2017.[5] Consequentially, the conditions necessitating a July 2015 voluntary recusal of the elected presiding judge of the 416th Judicial District Court and the assignment of another no longer exist.

III. ASSIGNMENT OF JUDGE FROM ONE ADMINISTRATIVE JUDICIAL REGION TO ANOTHER EXPIRED

Judge Gallagher's assignment by the Hon. David Evans, Presiding Judge of the Eighth Administrative Judicial Region of Texas, to the First Administrative

[4] The documents do not state why the request for the assignment of a specific *active* district judge from the 8th Administrative Region was made. According to the § 74.055 list currently published on the 1st Administrative Region's website, there are currently more than 60 retired/senior and also approximately 100 active district judges available for assignment in the region. *See* http://www.txcourts.gov/1ajr/ (last viewed May 5, 2017).

[5] The Court may take judicial notice of this fact, which is a matter within its own knowledge and administrative responsibilities.

Judicial Region expired on its face after 157 days (on December 31, 2015) unless a trial on the merits was begun. *See* Ex. C. Judge Evans later extended the inter-regional assignment for an additional 366 days, 2016 being a leap year, through another written order. Ex. D. Defendant is unaware of any subsequent order extending Judge Gallagher's assignment from the Eighth to the First Administrative Judicial Region of Texas for any time period in 2017.[6]

Article V, Section 7 of the Texas Constitution requires Judge Gallagher to reside in his own judicial district. Since Judge Gallagher resides in the Eighth, he was *not* otherwise statutorily available for assignment in the First Administrative Judicial Region. *See* Tex. Gov't. Code Sec. 74.054(a).[7]

Despite Paxton's assertion of his constitutional rights, no trial on the merits commenced and *no* pre-trial matters were still pending on December 31, 2016, when Judge Gallagher's assignment expired. Moreover, on December 31, 2016, there were absolutely no pre-trial motions pending.

Since the expiration of his inter-regional assignment by Judge Evans, Judge Gallagher has issued a number of rulings either *sua sponte* or in response to motions filed *after* December 31, 2016. *See, e.g.*:

- "Order on Motion to Dismiss and Set Aside Indictment for Prosecutorial Misconduct Before the Grand Jury" – March 30, 2017 (motion filed under seal on or about March 20, 2017)

[6] The orders extending the inter-regional assignment were not filed in the clerk's records of the cases.

[7] *See* fn 1. Additionally, the Court may take judicial notice of Judge Gallagher's county of residence.

- "Order on State's Motion for Change of Venue," March 30, 2017 (motion filed February 9, 2017);

- "Order on State's Motion for Continuance" – March 30, 2017 (motion filed March 9, 2017) ;

Paxton hereby objects to the rulings on motions to preserve error and further moves that any rulings on them be vacated.

By the express terms of the inter-regional order of assignment, Judge Gallagher had no authority to preside in the First Administrative Judicial Region, and thereby the 416th District Court, and this case after December 31, 2016. Judge Gallagher's orders should be declared void. Paxton objects to Judge Gallagher's continued participation and rulings entered after December 31, 2016, in this case.

CONCLUSION

Paxton requests that his objection be granted, that any rulings made by Judge George Gallagher after the expiration of his assignment on December 31, 2016, be vacated and these cases returned to the presiding judge of the 416th Judicial District Court of Collin, County, for further proceedings.

Respectfully submitted,
HILDER & ASSOCIATES, P.C.

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OF COUNSEL

ATTORNEYS FOR DEFENDANT,
WARREN KENNETH PAXTON, JR.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May 2017, a true and correct copy of the above and foregoing **Objection and Motion** was served on all counsel of record via ECF, certified mail, return receipt requested, email, electronically, or hand delivery.

/s/ Philip H. Hilder
Philip H. Hilder

APPENDIX TAB 25

7/18/2019 4:08 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 35248801
By: T Burnett
Filed: 7/18/2019 4:08 PM

Nos. 1555100, 1555101, 1555102

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
V.	§	177th JUDICIAL DISTRICT
	§	
WARREN KENNETH PAXTON, JR.	§	HARRIS COUNTY, TEXAS

PAXTON'S MOTION TO SET ASIDE CHANGE OF VENUE AS VOID AND RETURN CASES TO COLLIN COUNTY, TEXAS

TO THE HONORABLE ROBERT JOHNSON:

WARREN KENNETH PAXTON, JR. ("Paxton"), moves that the State's change of venue be set aside as void and that the above-referenced causes be returned to Collin County, Texas because the transferring Collin County trial judge acted without authority and jurisdiction after the expiration of his judicial assignment. Paxton respectfully shows the Court the following:

Summary of the Motion

The trial judge who transferred the instant cases to Harris County, Texas lacked the authority to do so. On March 30, 2017, the Honorable George Gallagher entered an order granting the State's Motion to Transfer Venue. However, Judge Gallagher's appointment over these cases expired at midnight, January 2, 2017. The Court must also set this order aside and return the cases to their county of proper venue, Collin County.

I.

Previous Trial Court History

Paxton was originally indicted on July 28, 2015. The then-sitting Judge of the 416th Judicial District Court in Collin County, Texas, Chris Oldner, recused himself from hearing the cases. Ex. A; *See also* Tex. Govt. Code § 24.002.

On July 29, 2015, Judge Mary Murphy, Presiding Judge for the First Administrative Judicial Region of Texas, appointed Judge George Gallagher. The requested term of the

assignment was from July 28, 2015 through December 31, 2015. Ex. B. Judge Gallagher was only available for assignment by Judge Murphy because he was previously assigned to her region pursuant to Tex. Gov't Code § 74.056(b) by order from Hon. David Evans, Presiding Judge of the neighboring Eighth Administrative Judicial Region of Texas. *See* Ex. C.

On November 2 and 3, 2015, Paxton filed various pretrial Motions to Quash and Writs of Habeas Corpus.

On December 15, 2015, the Court denied Paxton's pretrial motions.

On December 21, 2015, Judge Evans entered an Order of Assignment by the Presiding Judge. The Order re-assigned Judge Gallagher "for a period of 366 days, beginning January 1, 2016." Ex. D.

On December 31, 2015, Paxton appealed Judge Gallagher's pretrial rulings.

On June 3, 2016, the 5th Court of Appeals affirmed the trial court's rulings on those pretrial motions.

On October 12, 2016, the Court of Criminal Appeals denied Paxton's Petition for Discretionary Review.

At 12:00 a.m. on January 2, 2017, Judge Gallagher's assignment to these matters **expired**. Thus, Judge Gallagher's authority to hear the cases ended. However, Judge Gallagher continued presiding over the cases without authority and continued to enter void orders.

On January 9, 2017, Judge Gallagher entered a scheduling order setting the cases for trial on the merits on May 1, 2017.

On February 16, 2017, Judge Gallagher held a hearing on the State's Motion to Transfer Venue.

On March 29, 2017, Judge Gallagher held another hearing on the State's Motion to Transfer Venue, the State's own Motion for Continuance filed so that the Attorneys Pro Tem could pursue their fees, and Paxton's renewed Motion to Dismiss arising from the grand jury misconduct of the Attorneys Pro Tem.

On March 30, 2017, Judge Gallagher denied the State's Motion for Continuance, denied Paxton's Motion to Dismiss, and granted the State's Motion for Change of Venue.

On April 11, 2017, Paxton filed a Motion asking Judge Gallagher to step down from the cases in compliance with Article 31 of the Texas Code of Criminal Procedure. Judge Gallagher refused.

On April 12, 2017, Judge Gallagher entered a scheduling order setting trial for the merits in Houston, Texas on September 12, 2017.

II.

Appellate History

On May 15, 2017, Paxton filed a Petition for Writ of Mandamus with the Fifth District Court of Appeals complaining of Judge Gallagher's refusal to leave the case in compliance with Article 31.09 of the Texas Code of Criminal Procedure.

On May 30, 2017, the Fifth District Court of Appeals granted Paxton's Writ of Mandamus and ordered Judge Gallagher off the case.

On June 8, 2017, the Collin County Commissioners Court filed a Petition for Writ of Mandamus with the Fifth District Court of Appeals complaining of Judge Gallagher legally-void orders to pay the Attorneys Pro Tem at exorbitant rates.

On August 21, 2017, the Fifth District Court of Appeals granted the Writ of Mandamus and concluded that the order requiring payment to the Attorneys Pro Tem was void. The Fifth

District Court of Appeals ordered Judge Gallagher to vacate the Second Order on Payment of Attorneys Pro Tem. However, Judge Gallagher was no longer on the case; Paxton's mandamus had already issued.

On September 19, 2017, the Attorneys Pro Tem filed their Petition for Mandamus with the Court of Criminal Appeals, asking the Court to issue a writ of mandamus against the Fifth Court of Appeals and asking for a stay of the proceedings.

On September 25, 2017, the Court of Criminal Appeals stayed the proceedings.

On November 21, 2018, the Court of Criminal Appeals issued its opinion, holding that the order to pay the Attorneys Pro Tem was indeed void and ordering the trial court "to issue a new order for payment of fees in accordance with a fee schedule that complies with Article 26.05(c) of the Texas Code of Criminal Procedure."

On December 27, 2019, the Attorneys Pro Tem moved for a rehearing.

On June 19, 2019, the Court of Criminal Appeals denied rehearing.

III.

Current Trial Court History

On June 9, 2017, the Collin County District Clerk formally transferred its entire file to Harris County.

On June 13, 2017, by random assignment, these matters were filed in the 177th Judicial District Court, with the Honorable Judge Robert C. Johnson presiding.

On July 7, 2017, at the Court's request, Paxton and the State filed a document setting out the procedural history of the case, as well as proposed scheduling orders.

On August 2, 2017, the Court entered a scheduling order.

On September 29, 2017, the Attorneys Pro Tem filed yet another Motion for Continuance.

On June 26, 2019, Attorney Pro Tem Nicole DeBorde moved to withdraw from the case for lack of payment.

Paxton has never sought any affirmative relief from the 177th Harris County District Court.

IV.

Argument and Authorities

At the time Judge Gallagher entered the order changing the venue of the cases from Collin County to Harris County, he was devoid of authority to enter the order. Article V, Section 7 of the Texas Constitution requires Judge Gallagher to reside in his own judicial district. Chapter 74 of the Texas Government Code controls judicial assignments by the presiding judge of any administrative judicial region. As a general rule, judges can only be assigned within their own judicial region. *See* Tex. Gov't. Code Sec. 74.052 (Vernon 2019). As Judge of the 396th Judicial District Court for Tarrant County, Texas, Judge Gallagher works in the Eighth Administrative Judicial Region. Judge Gallagher was not generally available for assignment in the First Administrative Judicial Region, which is where Collin County is located. *See* Tex. Gov't. Code Sec. 74.054(a) (Vernon 2019).

Regarding inter-regional assignment: How can the presiding judge (Judge Mary Murphy) of one administrative judicial region (the First) assign a judge from an entirely different judicial region (the Eighth)? The answer is simple: "By consent." The Texas Government Code provides a procedure for just such an assignment. Under Section 74.056(b) of the Texas Government Code, "The presiding judge of one administrative region may request the presiding judge of another administrative region to furnish judges to aid in the disposition of litigation pending in a county in the administrative region of the presiding judge who makes the request." *See* Tex. Gov't. Code Sec. 74.056(b) (Vernon 2019). Under Texas law, Judge Mary Murphy's authority to appoint Judge

Gallagher was *derivative of and limited by* Judge Evans' authority to grant her request. "Generally, visiting judges are assigned either for a period of time or for a particular case." *In re Republic Parking Sys. of Tex., Inc.*, 60 S.W.3d 877, 879 (Tex.App.—Houston [14th Dist.] 2001, orig. proceeding.). Here, Judge Evans limited that authority by time. Evans' assignment of Gallagher indisputably expired at 12 a.m. on January 2, 2017. Time just simply ran out. Judge Gallagher was never validly reassigned by Judge Evans to the case, and every single order Judge Gallagher continued to enter after his assignment expired was erroneous for lack of authority.

Under Texas law, the terms and language of the assignment dictate the amount and duration of authority the assigned judge has over the case. *In re Republic Parking Sys. of Tex., Inc.*, 60 S.W.3d 877, 879 (Tex.App.—Houston [14th Dist.] 2001, orig. proceeding); see *In re Eastland*, 811 S.W.2d 571, 572 (Tex.1991)(orig. proceeding); *In re Nash*, 13 S.W.3d 894, 898 (Tex.App.—Beaumont 2000, orig. proceeding); see *In re Tenet Healthcare, Ltd.*, 104 S.W.3d 692 (Tex.App.—Corpus Christi 2003, orig. proceeding). In 2013, the Dallas Court of Appeals decided this issue in *In re Amos*, holding, "The terms of the assignment order control the extent of the visiting judge's authority and when it terminates." 397 S.W.3d 309, 314 (Tex.App. – Dallas 2013, no pet.) quoting *Mangone v. State*, 156 S.W.3d 137, 139-40 (Tex.App.-Fort Worth 2005, pet. ref'd) (footnote omitted). Indeed, an otherwise-qualified, assigned judge's actions outside the scope of his assignment present (to put it mildly) a "procedural irregularity." *Id.*, *citing Wilson v. State*, 977 S.W.2d 379, 380 (Tex.Crim.App.1998). In Wilson v. State, the judge assigned to a particular trial court for a five-week period presided over a trial three days after his assignment had expired. *Wilson* at 380. Here, the exact same "procedural irregularity" exists with Judge Gallagher as existed in *Wilson*.

In order to challenge such a procedural irregularity, Paxton must raise the objection in the

trial court; it cannot be raised for the first time on appeal. *Id.* In *Amos*, the Fifth Court of Appeals concluded that, "when an otherwise qualified assigned judge renders an order in a criminal case that exceeds the authority conferred by his or her order of assignment, the order is erroneous, although not void" and granted the requested relief because reversal was a near certainty. *Amos* at 315-317. Moreover, the Fifth Court of Appeals found that any further proceedings by the Judge whose assignment expired "will be improper, and any orders or judgments resulting from those proceedings will be erroneous and subject to reversal, resulting in a waste of judicial resources." *Id.* at 317. In the present case, Judge Gallagher continued making improper rulings and orders after the expiration of his assignment, and those rulings and orders were and are erroneous and are going to result in a continued waste of judicial resources in a case that has proceeded for almost four years now.

While the Dallas Court of Appeals has held that a judge's orders issued outside the scope of his or her appointment present a "procedural irregularity," the great weight of Texas legal authority suggests that they are, in fact, void, not just irregular. In 1991, the Texas Supreme Court held that when a visiting judge's actions exceed the scope of the assignment, the resulting orders are void. *In re Eastland*, 811 S.W.2d 571 (Tex.1991)(orig. proceeding). In *Eastland*, a visiting judge was assigned to hear a disbarment trial, and the plain terms of the assignment permitted him to continue only so long as to complete the trial and to pass on any motions for new trial. The visiting judge went on to hear a contempt hearing, and the Texas Supreme Court held that the contempt order was void, since the visiting judge lacked authority to enter the order. *Id.* at 572. In 2000, the Beaumont Court of Appeals, citing *Eastland*, held that a similar contempt judgment issued outside the scope of a visiting judge's assignment was void. *In re Nash*, 13 S.W.3d 894, 899 (Tex.App.—Beaumont, 2000). In 2007, the Texarkana Court of appeals, again citing

Eastland, held that a final order was void based on its issuance outside the scope of the visiting judge's assignment. *In re B.F.B.*, 241 S.W.3d 643, 647 (Tex.App.—Texarkana, 2007). However, perhaps the most persuasive precedent on this point comes from the same Dallas Court of Appeals in a case related to the one at hand.

When Paxton challenged Judge Gallagher's authority to remain on the case after the venue change, the Dallas Court of Appeals had no problem finding that his subsequent orders were void, not just irregular. *In re Paxton*, No. 05-17-00507-CV, No. 05-17-00508-CV, No. 05-17-00509-CV, 2017 WL 2334242 (Tex.App.—Dallas May 30, 2017). The Dallas Court of Appeals held, "A judgment is void when it is apparent from the record that 'the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, **or no capacity to act as a court**." *Id.*, quoting *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex.1990) (orig. proceeding) (per curiam) [emphasis added]. Judge Gallagher's capacity to act as a court after January 2, 2017 derived solely from Judge Evans' order of assignment and nowhere else. Similarly, in *In re Collin County,* the Dallas Court of Appeals held that Judge Gallagher's deviation from the mandated fee schedule in paying the Attorneys Pro Tem was not just irregular, but void. *In re Collin County*, 528 S.W.3d 807, 814 (Tex.App.—Dallas, 2017). Under the Dallas Court of Appeals' own precedents issued in relation to this very case, the Court must vacate the change of venue ordered by Judge Gallagher at a time when he acted outside of his legal authority or capacity, and the Court must send this case back to its county of origin: Collin County, Texas. No other result can accommodate these facts.

V.

Conclusion

Paxton respectfully requests that the Court enter an order vacating and setting aside the change of venue in the above-referenced causes and transferring this matter back to the 416th Judicial District Court in and for Collin County, Texas. Paxton further pleads for such relief to which he may be entitled at law or in equity.

Respectfully submitted,

HILDER & ASSOCIATES, P.C.

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WARREN KENNETH PAXTON, JR.

CERTIFICATE OF SERVICE

I hereby certify that on the July 18, 2019, a true and correct copy of the above and foregoing motion was served on all counsel of record electronically via the e-filing service provider.

/s/ Philip H. Hilder
Philip H. Hilder

APPENDIX TAB 26

12/13/2019 4:12 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 39250260
By: J Banks
Filed: 12/13/2019 4:12 PM

Nos. 1555100, 1555101, 1555102

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
V.	§	177th JUDICIAL DISTRICT
	§	
WARREN KENNETH PAXTON, JR.	§	HARRIS COUNTY, TEXAS

PAXTON'S REPLY TO STATE'S RESPONSE TO MOTION TO RETURN VENUE TO COLLIN COUNTY

TO THE HONORABLE ROBERT JOHNSON:

WARREN KENNETH PAXTON, JR. ("Paxton"), replies to the Attorneys Pro Tem's ("APT") response to his Motion to Return Venue to Collin County, Texas as follows:

A. Res Judicata Does Not Apply as No Final Judgment Has Been Entered and the Court May Rescind Its Rulings

The APTs fail to cite any authority that a pre-trial ruling is not subject to reconsideration by a trial court in Texas. The assertion of *Res Judicata* is frivolous on its face as it fails two of the three elements identified: (1) there is no final judgment by a court of competent jurisdiction; and (2) this is not a second or subsequent action; it is the same case. Worse yet, the State mischaracterizes the Texas Supreme Court's holding in *Amstadt v. U.S. Brass Corp.,* 919 S.W.2d 644, 652-3 (Tex. 1996), which explained, "[t]he doctrine of res judicata creates an exception to this rule by **forbidding a second suit arising out of the same subject matter of an earlier suit** by those in privity with the parties to the original suit." *Id.* (emphasis added).[1] A judgment is final for res judicate purposes when it disposes of all parties and all issues in a lawsuit. *Walker v. Sharpe,* 807 S.W.2d 442, 445 (Tex.App.—Corpus Christi 1991, writ denied). This is not a second suit, it

[1]Confusingly, the State condemns Paxton's citations to the Texas Supreme Court decision *In re Eastland,* (Response at pg. 2, fn. 1), while its entire res judicata argument relies upon its misinterpretation of the Texas Supreme Court's decision in *Amstadt v. U.S. Bras Corp,* 919 S.W.2d 644 (Tex. 1996), *on the same page* and as it has routinely done in its own pleadings. *See e.g. Response* at 2 ("…in the prior action. *Amstadt v. U.S. Brass Corp.,* 919 S.W.2d 644, 652 (Tex. 1996)"); *Attorneys' Pro Tem Motion that This Court Declare Art. 26.05 Tex. Code. Crim. Proc. Unconstitutional* at fn. 6, 26, and 27. Moreover, it ignores the Fifth Court of Appeals citations to Texas Supreme Court precedent in its decision in this very case. *See In re Paxton,* 2017 WL 2334242 (Tex.App.–Dallas May 30, 2017).

is the same case – which is not yet even completed. The APTs do not, because they cannot, cite any authority that a trial court cannot revisit a pre-trial venue ruling. A ruling on a motion to transfer venue is not a final judgment and may be re-urged or re-visited at any time by the appropriate judge.

An order transferring venue is not appealable by Defendant until after conviction.[2] Yet, the Texas Court of Criminal Appeals has found there is no specific time limit on the trial court's power to rescind even final appealable orders. *Kirk v. State,* 454 S.W.3d 511 (Tex.Crim.App. 2015)(No specific time limit on trial court's power to rescind granting of a new trial even where seventy-five day limitation to rule expired and original ruling appealed). Recently, the Court of Criminal Appeals upheld a trial court's denial of two successive motions to change venue, which were then re-urged after the commencement of trial. Tellingly, the Court of Criminal Appeals did not say that a party or trial court was precluded from re-visiting a prior venue ruling. *Suniga v. State*, No. AP-77,041, slip. op. at 47-50 2019 WL 1051548 (Tex.Crim.App. Mar. 6, 2019) (per curiam, not designated for publication).[3] Instead, the *Suniga* decision held that the trial court properly held a hearing on the second motion, albeit "somewhat informal." *Id.* at 47. This Court may consider, from its own experience, pre-trial orders that are routinely re-visited, including the amount or conditions of bail, discovery and trial dates. Venue is no different in that regard and the State can point to no authority otherwise.

[2] It may, in some circumstances, give rise to mandamus. For example, the State may successfully petition for mandamus when venue is transferred erroneously because "a trial court's order granting a change of venue is not an order the State may appeal." *In Re Reed,* Case No. 04-14-00507-CR (Tex.App. —San Antonio October 1, 2014); Tex. Code Crim. Pro. art.44.01(a). Likewise, in a civil case mandamus is appropriate to enforce a mandatory venue statute. *In re Cont'l Airlines, Inc.*, 988 S.W.2d 733. 735 (Tex. 1998)(orig. proceeding).

[3] Slip Opinion available at http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=4d23a629-216b-400e-8920-8c4d3328fc70&coa=coscca&DT=OPINION&MediaID=c322653b-c5b8-4129-9c3c-cd85ae4f7f6a (last viewed December 13, 2019).

Moreover, the APTs misunderstand the Fifth Court of Appeals' ruling in this case, a decision the APTs lost because they misunderstood the law of venue then, as they do now. The Fifth Court of Appeals was not asked to consider whether Judge Gallagher's initial order transferring venue was valid or void. Instead, its inquiry was limited to whether Gallagher maintained whatever jurisdiction he had after transferring venue. Although not before the Fifth Court of Appeals, the venue transfer was void *ab initio,* because Judge Gallagher's assignment and thereby his jurisdiction, had expired.[4] As the *Paxton* decision observed, "a judgment is void when it is apparent from the record that 'the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, **or no capacity to act as a court.**'" *Paxton,* supra (citing *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990) (orig. proceeding) (per curiam)). The argument that Paxton should seek a ruling from the very judge whose authority had expired is nonsensical. That Paxton did not raise that particular issue in the mandamus proceeding is of no consequence.[5]

B. Paxton has Not Waived any Claim Because He Made His Objection Pre-trial in Accordance With Texas Court of Criminal Appeals Precedent

Paxton's objection, made in writing in his motion, is timely because it was made pre-trial. There is *no* law or rule that a criminal defendant must object to the expiration of a trial judge's assignment at a particular time pre-trial. Indeed, the Court of Criminal Appeals expressly addressed when Paxton must object in *Wilson v. State,* 977 S.W.2d 379, 380 (Tex.Crim.App. 1998), holding:

[4] *See* Ex. "A," Recusal of Judge Oldner; Ex. "B" Request for Judge Gallagher to be assigned to 1st Admin. Judicial Region; Ex. "C" Order of Assignment of Judge Gallagher, expiring January 1, 2016; Ex. "D," Order of Assignment of Judge Gallagher expiring January 1, 2017 (88 days before the order transferring venue was signed).

[5] Contrary to the APT's representation, Regional Administrative Judge Mary Murphy did not direct Paxton "to direct his complaint to the court of appeals" and no exhibit was attached supporting this erroneous allegation. *See* Response at pg. 4.

> "How, then, may a defendant challenge the authority of a trial judge, who is otherwise qualified, to preside pursuant to an expired assignment? We hold that such a defendant, if he chooses, may object pretrial; if he does not, he may not object later or for the first time on appeal."

This holding conclusively establishes Paxton's objection is timely. It further suggests that he could not first seek a remedy in the Court of Appeals, as the APT urges Paxton should have done.

Rather than address the eight cases cited by Paxton in support of his position in the motion, the State's reply cites two decisions that have nothing to do with an assigned judge and are distinguishable to the point of irrelevance. The first, *Garza v. State* related to whether it was necessary to object witness trial testimony when a motion to suppress was carried with trial. *Garza v. State,* 126 S.W.3d 79, 81 (Tex.Crim.App. 2004). The second, *Geuder v. State,* related to whether a Defendant preserved error at trial through a motion in limine and objection outside presence of the jury to the admission of his prior felony convictions. *Geuder v. State,* 115 S.W.3d 11, 13-14 (Tex.Crim.App. 2003). Neither case cited by the APT deal with a ruling on a pre-trial motion. A trial in this case has not even begun, let alone concluded. Even then, a court may revisit its rulings on a motion for new trial. *See Suniga,* supra.

On March 30, 2017, the Honorable George Gallagher entered an order granting the APT's Motion to Transfer Venue, three months after his assignment expired on January 2, 2017. Under precedent, the Court must vacate the change of venue ordered by Judge Gallagher at a time when he acted outside of his legal authority or capacity, and send this case back to Collin County, Texas.

Prayer

Paxton respectfully requests that the Court enter an order vacating and setting aside the change of venue in the above-referenced causes and transferring this matter back to the 416th Judicial District Court in and for Collin County, Texas. Paxton further pleads for such relief to which he may be entitled at law or in equity.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2019, a true and correct copy of the above and foregoing motion was served on all counsel of record electronically via the e-filing service provider.

/s/ Philip H. Hilder
Philip H. Hilder

APPENDIX TAB 27

REPORTER'S RECORD

Volume 1 of 1 Volume

Trial Court Cause Nos. 1555100, 1555101 & 1555102

THE STATE OF TEXAS	:	IN THE DISTRICT COURT OF
VS.	:	HARRIS COUNTY, T E X A S
WARREN KENNETH PAXTON, JR.	:	177TH JUDICIAL DISTRICT

PROCEEDINGS
VIA ZOOM

On the 10th day of June, 2020, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Robert Johnson, Judge presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

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Official Court Reporter - 177th District Court
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P R O C E E D I N G S

June 10, 2020

THE COURT: We're back on the record.

Let the record reflect the State is present by Zoom along with Defense counsel. I'm not quite sure if the defendant, Mr. Paxton, is present or not. Is he?

MR. COGDELL: He is not, Your Honor We were told this was a meeting and not a hearing, and he is not present.

THE COURT: Correct. Correct. I was just trying to make sure the record is crystal clear.

State --

MR. COGDELL: Yes, sir.

THE COURT: -- you had something that you wanted to put on the record. You may proceed.

MR. WICE: Thank you, Judge. Brian Wice and Kent Schaffer on behalf of the State of Texas.

May it please the Court, I'm going to be mercifully brief because I think that the e-mail that the State sent to the Court and the

parties last week speaks for itself.

I think the bottom line, Your Honor, is that the Court of Criminal Appeals reinvested this Court with jurisdiction in this case almost a year ago, and there are still three motions that are pending that have not been ruled on: The unopposed motion of Nicole DeBorde to withdraw, which I am told the Court may have orally granted but has never formally ruled on; the Defense motion --

THE COURT: I've never ruled -- I'm sorry. I've never ruled on that motion at all. All right.

MR. WICE: Thank you, Judge.

The Defense motion to return venue to Collin County as a result of Judge Gallagher's allegedly lapsed judicial appointment, and then the State's motion for the Court to heed the mandate of the Court of Criminal Appeals by fashioning a revised payment order that comports with Article 26.05(c).

And the only thing that I will add because the State does not plan on arguing the merits of any of these motions -- I think they've been briefed to death by really good lawyers on both

sides -- is that as our e-mail points out the State has now made a concession we believe of borderline monumental proportion of accepting for the work that we have done in 2016 and the future $100 an hour which was the fee that Collin County's fee schedule permitted at the time of the Court of Criminal Appeals remand.

Again, I think the one thing that both sides can agree on is that while neither side is entitled to rulings that they like, they're certainly entitled to rulings within a reasonable amount of time; and it's the State's position that these motions have been pending for a reasonable amount of time.

And while I want it correct something that I did say is the e-mail about the prospect of these cases being worked out in the event the Court rules, I didn't mean to presuppose or speak out of turn. All I can say is that as long as these motions are pending this case will certainly not be resolved.

And so what the State would ask is that ideally the Court rule on these motions today as it has asked this Court to in the past on a number of occasions, but barring that, the Court

enter written rulings within ten days from today's date.

And with that, I'll turn it over to Mr. Schaffer.

MR. SCHAFFER: I have nothing further to add, Your Honor. I mean, basically we're all in a standstill pattern until there's a ruling one way or another; but that's all we can ask for.

THE COURT: Defense counsel.

MR. COGDELL: Judge, this is Dan Cogdell. I sent you an e-mail earlier, and I don't know if you got it because it looks like you didn't --

THE COURT: I got it. I just haven't had a chance to read it.

MR. COGDELL: Okay. Well, I just want to summarize really just three things, Judge.

The first is it's been our position for some time that Judge Gallagher's appointment had expired and he lacked jurisdiction by the time he granted the State's change of venue and concomitantly this Court lacks jurisdiction to preside over this. I know we've raised that. I just didn't want to appear and not refresh the Court's memory because I didn't want the Court to

take this as a waiver of that position.

Secondly, and I think I may have read Mr. Wice's e-mail a bit differently than he -- he intended it; but I don't agree with the suggestion that the parties can resolve the matter after the Court rules on the various motions.

And, third, it was my understanding that today we weren't going to -- we weren't going to argue the merits of the motions and we were just going to allow the State to address the Court in the manner that they see fit.

In terms of the ten-day requirement, you know, I understand the Court's been busy. We've all been busy, but I'm not about to put or suggest a time limit to the Court in terms of the ruling on the matters. The Court can rule when it sees fit from the Defense's position.

THE COURT: Anything --

MR. MATEJA: Your Honor, this is --

THE COURT: Go ahead.

MR. MATEJA: Yeah, Your Honor, this is Bill Mateja. Just one other thing I want to add is that there actually is another motion that Defendant Paxton filed which is an alternative motion to his motion to set aside the change of

venue based on lack of jurisdiction, that there was a motion that was filed on July 22nd which is an alternative motion to return venue to Collin County based on fairness and changed circumstances. The Court need not get to that. It is an alternative motion. We still urge our primary motion to change venue as void and return the case to Collin County as Mr. Cogdell mentioned.

THE COURT: Okay. Anything further from Defense or the State? And, again, this is -- this is just an informal -- I thought it was an informal meeting; but, again, the State has the right to request that a record be made.

Anything further from either parties?

MR. WICE: Briefly --

MR. COGDELL: No, sir.

I'm sorry.

MR. WICE: Briefly from the State, Your Honor, a couple of quick takes. No. 1, the State agrees that the Defense's participation in this meeting today will not in any way, shape or form operate as a waiver of their initial claims.

But, Judge, at the end of the day, I know we've been operating under a different system

in the wake of COVID-19; but --

THE COURT: I was getting -- I was getting ready to speak to that, but go ahead.

MR. WICE: But the Texas Supreme Court only held two weeks ago that the pandemic that we now find ourselves in the midst of does not suspend court operations and certainty doesn't suspend the Constitution. And it's our position that the Texas Supreme Court turned around a pretty complicated case that ironically the defendant's office brought to enforce voting in person as opposed to at-will absentee balloting and they did that a week after oral argument and that was a pretty complicated case.

Moreover, the Fifth Circuit in the companion case also brought by the defendant's office turned around a temporary restraining order issued by Federal District Court Judge Fred Biery five days; and that was the case that involved standing and abstention and the right to vote and maybe, you know, the rule in Shelley's case. I don't know.

But the issues that these two motions -- and aside from the unopposed motion of Nicole DeBorde to withdraw -- basically have been

briefed to death. We had a hearing certainly on this Defense motion to return venue to Collin County in December. It will be six months next week on that motion. It will be a year on the State's motion for the Court to obey the CCA mandate to pay us a reasonable fee.

And at the end of the day, Judge, this case is not going to move forward while those motions are pending. And so the reason why the State sought this meeting today, once again, is we are asking this Court to follow its ministerial duty to rule on pending motions within a reasonable time; and that's why at some point, Judge, the State has got to ask this Court to rule either today, which obviously it's not prepared to, but within ten days from today which will then constitute more than a reasonable timeframe within which if it's discharged or should discharge its ministerial duty.

THE COURT: Okay. Anything else from State or Defense?

MR. COGDELL: Not from the Defense, Your Honor.

MR. SCHAFFER: No, Your Honor.

THE COURT: Okay.

MR. WICE: Judge -- Judge, I would

ask that Ms. Hacker prepare a record of this proceeding.

THE COURT: Well, I'd like to say something if I can before we go off the record if -- if that's okay.

MR. COGDELL: Of course.

MR. WICE: Of course.

THE COURT: Okay. Well, due to the Coronavirus, the Court at this time was not conducting any trials and was not conducting hearings up until Judge Susan Brown issued an order which allowed us to start conducting hearings on June the 1st. But prior to that, we were not conducting hearings or trials, especially those hearings that were classified as nonessential. And my understanding is that jury trials here in Harris County have been suspended until August.

So, once again, we are currently in the middle of the Coronavirus; and this Court has not forgotten about the Paxton case. And this Court does plan to rule on these outstanding motions, and I will do that within the next ten days. As a matter of fact, let's set it for June 25th.

MR. WICE: Judge, can I ask the Court a question?

THE COURT: Is everybody okay with June the 25th at -- at 3:00?

MR. COGDELL: If -- if you're requiring the parties' presence, Your Honor, I have a hearing in Smith County on June 25th at 1:30. I could do the following --

THE COURT: Well, is there somebody else, Mr. Cogdell, that can appear on your behalf if you can't make it?

MR. COGDELL: Yes, sir. I'd like to --

THE COURT: Okay.

MR. COGDELL: -- be there; but, yes, sir.

MR. MATEJA: Your Honor, let me ask one question. Are you -- would you require the defendant's appearance in which case we'd need to check with his schedule to make sure that he's available on that day?

THE COURT: I think -- I think this is part of the problem that the Court has been having as far as ruling on these outstanding motions has been, but I would like for Mr. Paxton to be present. I really would.

MR. MATEJA: All right.

THE COURT: But, again -- but, again, I'm going to rule on these motions within the next ten days; and I would like to do it on June 25th at 3:00 o'clock if at all possible.

MR. WILLIAMS: I assume that's a Zoom hearing, Your Honor?

THE COURT: It is. At this time we are requesting and encouraging attorneys and defendants to appear remotely if possible.

MR. COGDELL: If it's a --

THE COURT: If not --

MR. COGDELL: If it's a Zoom hearing --

THE COURT: We do not want anyone to come down here and make a physical appearance and wind up getting sick. We do not want that.

MR. COGDELL: Certainly. If it's a Zoom hearing, I -- I reverse my earlier comments. I can participate via Zoom at 3:00 o'clock on the 25th.

MR. WICE: Your Honor, can I ask --

THE COURT: Any --

MR. WICE: I'm sorry.

THE COURT: Any objection from the State as far as June 25th at 3:00 o'clock?

MR. WICE: Can I ask a question, Judge? And if it's --

THE COURT: Yes.

MR. WICE: Judge, what exactly is going to happen on June the 25th?

THE COURT: I'm going to rule on these outstanding motions.

MR. WICE: Fair enough. Then the State has no objection to proceeding on June 25th at 3:00 o'clock.

THE COURT: Okay. We'll put it on the docket. I'll see you guys then. Thank you so much. Have a good evening.

MR. WICE: May we be excused, Judge?

MR. COGDELL: Thank you, Your Honor.

THE COURT: You may. Thank you.

(Off the record.)

(Proceedings adjourned.)

THE STATE OF TEXAS :

COUNTY OF HARRIS :

I, LINDA HACKER, Official Court Reporter in and for the 177th District Court of Harris County, Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open Court or in Chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $_____ and was paid or will be paid by Attorney Pro Tem Brian Wice.

WITNESS MY OFFICIAL HAND on this the 26th day of June, 2020.

/s/ Linda Hacker
LINDA HACKER, CSR No. 4167
Expiration Date: 1-31-21
Official Court Reporter
177th District Court
201 Caroline, 13th Floor
Houston, Texas 77002
832-927-4250

APPENDIX TAB 28

1/7/2020 2:37 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 39742783
By: J Banks
Filed: 1/7/2020 2:37 PM

Nos. 1555100, 1555101, 1555102

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
V.	§	177th JUDICIAL DISTRICT
	§	
WARREN KENNETH PAXTON, JR.	§	HARRIS COUNTY, TEXAS

PAXTON'S POST HEARING MEMORANDUM TO CORRECT INACCURATE ARGUMENTS BY STATE

TO THE HONORABLE ROBERT JOHNSON:

WARREN KENNETH PAXTON, JR. ("Paxton"), files this memorandum to correct the Attorney Pro Tem's assertions regarding the timeliness of Paxton's objection during the December 17, 2019, hearing before this Court and shows:

The Attorneys Pro Tem's (APTs) sole argument against returning the case to Collin County appears to be that Paxton somehow waived his right to challenge Judge Gallagher's authority because of unreasonable delay. This position is wholly without merit. Paxton raised the issue as soon as he became aware of the situation. Any delays are the result of the APTs request that Judge Gallagher hear the matter in Harris County and the stay of these cases while the APTs fought over their fees. Paxton re-urged the issue in a new pleading as soon as the appellate stays were lifted. Most importantly, the Court of Criminal Appeals does not require Paxton to object at a particular time so long as it is pre-trial, which he has done on numerous occasions.

A. Paxton Discovered the Trial Judge's Expired Assignment on April 25, 2017, and timely filed the Objection within 15 Days

Paxton did not unreasonably delay objecting to Judge Gallagher's expired assignment. Rather, Paxton objected shortly after he learned of the situation nearly three years ago.

The December 21, 2015, "Order of Assignment by the Presiding Judge" of the Hon. George Gallagher, was *not* filed in the clerk's record in the case.

Paxton only learned of the document by happenstance after making a specific request seeking appointment documents to the regional administrative Judge, the Hon. Mary Murphy, who sent the relevant records to defense counsel on April 25, 2017. (Ex. A at p. 1).

On May 10, 2017, only fifteen days after its discovery, Paxton filed his objection. (Ex. B). Therefore, Paxton timely objected.

B. The Attorneys Pro Tem Requested the Hearing on the Defense Objection to Judge Gallagher Take Place in Houston Which Caused the Delay they Now Protest.

The Court should be aware that it was the Attorneys Pro Tem who requested a hearing on the Defense's objection to Judge Gallagher *in Harris County*. They are the reason that this matter is only now being addressed.

The day after Paxton filed his objection, May 11, 2017, one of the ATPs emailed Judge Gallagher (Ex. C) requesting a hearing in Harris County, writing:

> Good morning Judge Gallagher:
>
> On May 10, 2017, the defense filed "Paxton's Objections to Rulings Made by Judge Sitting by Expired Assignment and Motion to Return Case to Presiding Judge of the 416th District Court." Although styled as "objections," the pleading is, in reality, a motion requesting the relief set forth in its conclusion on p. 5 of the pleading, with an order attached thereto.
>
> The State respectfully requests a hearing on Paxton's "objections" to be held in Harris County at the Court's earliest convenience consistent with the availability of all counsel.

On May 12, 2017, Judge Gallagher emailed counsel an order setting a hearing in Harris County . (Ex. D). The hearing never occurred because Paxton applied for mandamus on May 15, 2017 to remove Judge Gallagher from the case. *In re Paxton*, No. 05-17-00507-CV, No. 05-17-

00508-CV, No. 05-17-00509-CV, 2017 WL 2334242 (Tex.App.—Dallas May 30, 2017). Had the APTs not demanded and Judge Gallagher not attempted to improperly travel to Harris County with the case for a hearing on this matter, an earlier resolution may have been possible. In an effort to avoid precisely this argument from the APTs, Paxton re-urged this issue in a new pleading as soon as he was able after stays relating to various appellate litigation were lifted.

C. Paxton Re-Urged His Objection Regarding the Venue Change as Soon as the Stay for the Appeals over the APTs fees was Lifted.

A few weeks after the May 30, 2017, removal of Judge Gallagher from the case by the 5th Court of Appeals, APT fee litigation commenced in the Courts of Appeals. These three cases were stayed by this Court pending the outcome of the mandamus proceeding regarding the APT fees. That finally ended when mandate issued from the Texas Court of Criminal Appeals after the APT's motion for rehearing was denied on June 19, 2019. Less than thirty days later, Paxton *again* brought this matter to the Court's attention.

On July 18, 2019, Paxton filed his *Motion to Set Aside Change of Venue and Return Cases to Collin County, Texas,* restating his May, 2017, objection and request. It has been the subject of responsive pleadings and oral hearings since that date. To state that Paxton has not diligently pursued this matter since its discovery borders on fantasy. Paxton has clearly sought relief in this regard in the trial court at every moment the case was not stayed. Paxton has not participated in any meaningful matters in these cases when his objections were not pending or discussed that could rationally be interpreted as waiver.

Now that the Attorneys Pro Tem finally have had their requested hearing in Harris County on this issue, (a request that began the years of delay) they claim Paxton's objection was untimely, without any reference to applicable authority and contrary to unambiguous authority from the Texas Court of Criminal Appeals.

D. Paxton has Not Waived any Claim Because He Made His Objection Pre-trial in Accordance With Texas Court of Criminal Appeals Precedent

Regardless of when he found out, Paxton's written objection was timely because it was made pre-trial, which is all that is required by Texas law. There is *no* law or rule that a criminal defendant must object to the expiration of a trial judge's assignment at a particular time pre-trial. The Court of Criminal Appeals has only required that a defendant object **"pretrial."** In *Wilson v. State,* 977 S.W.2d 379, 380 (Tex.Crim.App. 1998), holding:

> "How, then, may a defendant challenge the authority of a trial judge, who is otherwise qualified, to preside pursuant to an expired assignment? We hold that such a defendant, if he chooses, may object pretrial; if he does not, he may not object later or for the first time on appeal…[a] timely objection in the trial court will afford both the trial judge and the State notice of the procedural irregularity and an adequate time to take appropriate corrective action." *Id.* (internal citation omitted).

The Attorney Pro Tem asserted to this Court that the remainder of *Wilson* supported its position. It does not. *Wilson* nowhere mandates a particular time to object pre-trial, only to object **"pretrial."** Instead, the remainder of *Wilson* consists of the following observation by the Court of Criminal Appeals,

> "Appellant **never** complained to Judge Burdette that his assignment expired. Therefore appellant forfeited his right to challenge the authority of Judge Burdette to preside in this cause." *Id.* (emphasis added).

That is not the case here. Paxton objected shortly after discovering Judge Gallagher's expired assignment, which was indisputably, pretrial. Paxton has not yet had a trial. According to binding Court of Criminal Appeals precedent, Paxton timely objected.

Conclusion

Paxton respectfully requests that the Court enter an order vacating and setting aside the change of venue in the above-referenced causes and transferring this matter back to the 416th

Judicial District Court in and for Collin County, Texas. Paxton further pleads for such relief to which he may be entitled at law or in equity.

Respectfully submitted,
HILDER & ASSOCIATES, P.C.

/s/ Philip H. Hilder
Philip H. Hilder

State Bar No. 09620050
Co-Lead Counsel
Q. Tate Williams
State Bar No. 24013760
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Facsimile: (214) 472-2150
mitch.little@solidcounsel.com

ATTORNEYS FOR DEFENDANT,
WARREN KENNETH PAXTON, JR.

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2020, a true and correct copy of the above and foregoing motion was served on all counsel of record electronically via the e-filing service provider.

/s/ Philip H. Hilder
Philip H. Hilder

APPENDIX TAB 29

FIRST COURT OF APPEALS

No. 01-20-00477-CR
No. 01-20-00478-CR
No. 01-20-00479-CR

In re State of Texas Ex Rel. Brian W. Wice

On Petition from the 177th District Court, Harris Co.
Nos. 1555100, 1555101, & 1555102

APPENDIX

to

Real Party in Interest Paxton's Response to Relator's Motion for Stay and Paxton's Motion to Dismiss the Petition for Writ of Mandamus for Lack of Jurisdiction

First Administrative Judicial Region

MARY MURPHY
Presiding Judge

133 N. Riverfront Blvd. LB 50
Dallas, TX 75207

214-653-2943
(fax) 214-653-2957

April 25, 2017

Hilder & Associates, P.C.
c/o Stephanie K. McGuire
819 Lovett Blvd
Houston, TX 77006

via email stephanie@hilderlaw.com

Re: Rule 12 Request regarding Hon. George Gallagher's assignment to the First Administrative Judicial Region

Dear Ms. McGuire:

By email dated April 24, 2017 addressed to Alisa Frame of my office, you requested copies of all communications, orders, and other documents from July 1, 2015 to the present regarding Judge Gallagher's assignment to the First Administrative Judicial Region and Judge Evans' July 28, 2015 order. Documents were delivered to you November 5, 2015 in response to your prior requests for information regarding Judge Gallagher's assignment to our region. Attached are additional copies of the documents we have that are responsive to your current request.

If you have any questions or need additional information, please let me know.

Sincerely,

Mary Murphy

APPENDIX TAB 30

TIME LINE OF PAXTON FAILING TO OBJECT TO JUDGE GALLAGHER'S LAPSED APPOINTMENT

JULY 28	1ST AJR PRES. JUDGE MARY MURPHY REQUESTS JUDGE GEORGE GALLAGHER TO PRESIDE IN PAXTON AFTER JUDGE CHRIS OLDNER VOLUNTARILY RECUSES HIMSELF
JULY 28	8TH AJR PJ DAVID EVANS ASSIGNS GALLAGHER TO THE 1ST AJR TO HEAR PAXTON FOR A PERIOD OF 157 DAYS
JULY 29	MURPHY ASSIGNS GALLAGHER TO PAXTON
DEC. 21	EVANS RE-ASSIGNS GALLAGHER TO 1ST RAJ TO HEAR PAXTON FOR 366 DAYS BEGINNING 1-1-16
DEC. 21	MURPHY EXTENDS GALLAGHER'S APPOINTMENT FROM OCT. 23, 2015 TO COMPLETE ANY ACTIONS IN PAXTON UNLESS APPOINTMENT IS TERMINATED
JAN. 2, 2017	GALLAGHER'S APPOINTMENT EXPIRES – **PAXTON FAILS TO OBJECT OR OTHERWISE COMPLAIN GALLAGHER'S APPOINTMENT HAS LAPSED SO JUDGE MURPHY CAN EXTEND HIS APPOINTMENT** [HEREINAFTER REFERRED TO AS "**PAXTON FAILS TO OBJECT**"]
JAN. 4	GALLAGHER SIGNS ORDER APPROVING PRO TEMS 2ND ROUND OF INVOICES – **PAXTON FAILS TO OBJECT**
JAN. 9	GALLAGHER ISSUES SCHEDULING ORDER SETTING JURY SELECTION AND TRIAL – **PAXTON FAILS TO OBJECT**
FEB. 7	GALLAGHER HOLDS CONFERENCE CALL WITH THE PARTIES – **PAXTON FAILS TO OBJECT**
FEB. 8	PAXTON FILES SERIES OF PRE-TRIAL MOTIONS – **PAXTON**

FAILS TO OBJECT

FEB. 9	STATE FILES MOTION TO CHANGE VENUE – **PAXTON FAILS TO OBJECT**
FEB. 15	PAXTON FILES A RESPONSE TO THE STATE'S MOTION TO CHANGE VENUE – **PAXTON FAILS TO OBJECT**
FEB. 16	GALLAGHER CONDUCTS EVIDENTIARY HEARING ON THE STATE'S MOTION TO CHANGE VENUE – **PAXTON FAILS TO OBJECT**
FEB. 22	GALLAGHER CONDUCTS CONFERENCE CALL WITH THE PARTIES – **PAXTON FAILS TO OBJECT**
MARCH 13	PAXTON FILES A RESPONSE TO THE STATE'S MOTION TO CHANGE VENUE – **PAXTON FAILS TO OBJECT**
MARCH 16	PAXTON FILES A MOTION UNDER SEAL TO DISMISS THE INDICTMENT – **PAXTON FAILS TO OBJECT**
MARCH 16	GALLAGHER CONDUCTS CONFERENCE CALL WITH THE PARTIES – **PAXTON FAILS TO OBJECT**
MARCH 22	GALLAGHER CONDUCTS CONFERENCE CALL WITH THE PARTIES – **PAXTON FAILS TO OBJECT**
MARCH 29	GALLAGHER CONDUCTS AN EVIDENTIARY HEARING ON PAXTON'S MOTION TO DISMISS AND ON HIS REPLY TO THE STATE'S MOTION TO CHANGE VENUE –**PAXTON FAILS TO OBJECT**
MARCH 30	GALLAGHER GRANTS STATE'S MOTION TO CHANGE VENUE, DENIES ITS MOTION FOR CONTINUANCE, AND DENIES PAXTON'S SEALED MOTION TO DISMISS – **PAXTON FAILS TO OBJECT**

APRIL 7	GALLAGHER CONDUCTS CONFERENCE CALL WITH THE PARTIES – **PAXTON FAILS TO OBJECT**
APRIL 10	GALLAGHER CONDUCTS CONFERENCE CALL WITH THE PARTIES – **PAXTON FAILS TO OBJECT**
APRIL 11	GALLAGHER ORDERS VENUE TO CHANGED TO HARRIS COUNTY – **PAXTON FAILS TO OBJECT**
APRIL 12	GALLAGHER ISSUES SCHEDULING ORDER SETTING CASE FOR TRIAL – **PAXTON FAILS TO OBJECT**
APRIL 12	PAXTON FILES NOTICE HE WILL NOT CONSENT TO GALLAGHER REMAINING AS PRESIDING JUDGE – **PAXTON FAILS TO OBJECT**
APRIL 18	PAXTON OBJECTS TO GALLAGHER'S CONTINUING PARTICIPATION – **PAXTON FAILS TO OBJECT**
APRIL 20	GALLAGHER HOLDS A MEETING WITH THE PARTIES IN HARRIS COUNTY TO DISCUSS SECURITY AND TRIAL-RELATED ISSUES – **PAXTON FAILS TO OBJECT**
MAY 10	**PAXTON OBJECTS TO ALL GALLAGHER'S RULINGS AND OBJECTS FOR THE FIRST TIME HIS APPOINTMENT LAPSED** AND SEEKS RETURN OF CASE TO COLLIN COUNTY
MAY 15	PAXTON FILES WRIT OF MANDAMUS SEEKING GALLAGHER'S REMOVAL – **BUT DOES NOT RAISE THE ISSUE OF HIS APPOINTMENT HAVING LAPSED**
MAY 30	FIFTH COURT OF APPEALS REMOVES GALLAGHER **BUT REPEATEDLY HOLDS THAT HIS AUTHORITY TO ACT DID NOT EXPIRE UNTIL AFTER HE ORDERED VENUE CHANGED**

APPENDIX TAB 31

FIRST COURT OF APPEALS

No. 01-20-00477-CR
No. 01-20-00478-CR
No. 01-20-00479-CR

In re State of Texas Ex Rel. Brian W. Wice

On Petition from the 177th District Court, Harris Co.
Nos. 1555100, 1555101, & 1555102

APPENDIX

to

Real Party in Interest Paxton's Response to Relator's Motion for Stay and Paxton's Motion to Dismiss the Petition for Writ of Mandamus for Lack of Jurisdiction

Alisa Frame

From: Alisa Frame
Sent: Tuesday, January 24, 2017 10:59 AM
To: 'Tracy Kemp'
Subject: RE: Judge George Gallagher

Tracy,

My thought is that Judge Gallagher's existing assignment covers his assignments in our Region as they are continuing cases, but I will confirm this with Judge Murphy and let you know for sure.

Alisa

-----Original Message-----
From: Tracy Kemp [mailto:THKemp@TarrantCounty.com]
Sent: Tuesday, January 24, 2017 9:44 AM
To: Alisa Frame <Alisa.Frame@firstadmin.com>
Subject: Judge George Gallagher

Hi Alisa,

Do you need Judge George Gallagher assigned to your region?

Tracy Kemp,
Administrative Assistant
8th Administrative Judicial Region
Tom Vandergriff Civil Courts Building
100 N. Calhoun St., 2nd Floor
Fort Worth, Tx. 76196-1148
Phone (817) 884-1558
Fax (817) 884-1560

Alisa Frame

From:	Alisa Frame
Sent:	Tuesday, January 24, 2017 11:01 AM
To:	Judge Mary Murphy (mmurphy@firstadmin.com)
Cc:	Candy Shiver
Subject:	FW: Judge George Gallagher

Do you want a new year-ling assignment from the 8th Region for Judge Gallagher?

His last assignment to Region 1 is dated December 21, 2015 and was for all of 2016. It contains the regular language that if the judge begins a trial on the merits during the period of the assignment, the assignment continues in such case until plenary jurisdiction has expired...

-----Original Message-----
From: Tracy Kemp [mailto:THKemp@TarrantCounty.com]
Sent: Tuesday, January 24, 2017 9:44 AM
To: Alisa Frame <Alisa.Frame@firstadmin.com>
Subject: Judge George Gallagher

Hi Alisa,

Do you need Judge George Gallagher assigned to your region?

Tracy Kemp,
Administrative Assistant
8th Administrative Judicial Region
Tom Vandergriff Civil Courts Building
100 N. Calhoun St., 2nd Floor
Fort Worth, Tx. 76196-1148
Phone (817) 884-1558
Fax (817) 884-1560

Alisa Frame

From: Alisa Frame
Sent: Tuesday, January 24, 2017 11:25 AM
To: Judge Mary Murphy
Cc: Candy Shiver
Subject: RE: Judge George Gallagher

No - I'm thinking he doesn't need one.

But Tracy Kemp asked and because of the matter on which he is sitting, I wanted to be sure.

-----Original Message-----
From: Judge Mary Murphy
Sent: Tuesday, January 24, 2017 11:09 AM
To: Alisa Frame <Alisa.Frame@firstadmin.com>
Cc: Candy Shiver <cshiver@firstadmin.com>
Subject: Re: Judge George Gallagher

I don't think so-- his prior assignment covers his case . Were you thinking something different?

Sent from my iPhone Mary Murphy

> On Jan 24, 2017, at 11:00 AM, Alisa Frame <Alisa.Frame@firstadmin.com> wrote:
>
> Do you want a new year-ling assignment from the 8th Region for Judge Gallagher?
>
> His last assignment to Region 1 is dated December 21, 2015 and was for all of 2016. It contains the regular language that if the judge begins a trial on the merits during the period of the assignment, the assignment continues in such case until plenary jurisdiction has expired...
>
> -----Original Message-----
> From: Tracy Kemp [mailto:THKemp@TarrantCounty.com]
> Sent: Tuesday, January 24, 2017 9:44 AM
> To: Alisa Frame <Alisa.Frame@firstadmin.com>
> Subject: Judge George Gallagher
>
> Hi Alisa,
>
> Do you need Judge George Gallagher assigned to your region?
>

Alisa Frame

From: Alisa Frame
Sent: Tuesday, January 24, 2017 11:41 AM
To: 'Tracy Kemp'
Subject: RE: Judge George Gallagher

Tracy,

I just confirmed with Judge Murphy that Judge Gallagher does not need a new assignment to Region 1 for 2017. His service in this Region is covered under the assignment to the Region from last year.

Thanks for checking in!

Alisa

-----Original Message-----
From: Tracy Kemp [mailto:THKemp@TarrantCounty.com]
Sent: Tuesday, January 24, 2017 9:44 AM
To: Alisa Frame <Alisa.Frame@firstadmin.com>
Subject: Judge George Gallagher

Hi Alisa,

Do you need Judge George Gallagher assigned to your region?

Tracy Kemp,
Administrative Assistant
8th Administrative Judicial Region
Tom Vandergriff Civil Courts Building
100 N. Calhoun St., 2nd Floor
Fort Worth, Tx. 76196-1148
Phone (817) 884-1558
Fax (817) 884-1560

APPENDIX TAB 32

1555100
1555101
1555102

p.13

NOs. 416-81913-2015
416-82148-2015
416-82149-2015

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
V.	§	416th JUDICIAL DISTRICT
	§	
WARREN KENNETH PAXTON, JR.	§	COLLIN COUNTY, TEXAS

PAXTON'S OBJECTION TO EXCESSIVE OR INTERIM PAYMENT OF FEES TO ATTORNEYS PRO TEM

TO THE HONORABLE JUDGE GALLAGHER:

WARREN KENNETH PAXTON, JR., ("Paxton"), pursuant to a request by the Court, files his *Objection to Excessive or Interim Payment of Fees to Attorneys Pro Tem* as follows:

I. INTRODUCTION

Paxton does not object to the payment of fees for pre-trial work to the Attorneys Pro Tem in this case if paid in accordance with the Texas Code of Criminal Procedure, the "Fair Defense Act," and the "Collin District Court Plan" ("The Plan"). Paxton objects to any additional amounts or interim payments in violation of law.[1]

[1]Paxton has not been provided with or obtained a copy of any completed request for compensation. However, a Defendant must object to procedural errors with respect to attorneys

Paxton understands there is a secret deal by Collin County District Court Judge Scott Becker to allow legal fee payments to the attorneys pro tem that are far in excess of the rates and limits established by Collin County. Because of the lack of transparency in disclosing the details of these financial arrangements, Paxton must object to any excessive or interim payments as unlawful.

II. PROCEDURAL HISTORY

On April 21, 2015, Judge Scott Becker appointed non-governmental counsel Kent Schaffer and Brian Wice to serve as Attorneys Pro Tem.[2] According to statements made by Judge Becker to Collin County Commissioner Chris Hill on August 18 and 19, 2015, Becker **secretly** agreed to pay the Attorneys Pro Tem $300.00 per hour.

Judge Becker amended the appointments to include violations of the Texas Securities Act On May 20, 2015.[3]

On July 7, 2015, Paxton was first indicted by the grand jury of the 416th District Court of Collin County, Texas. Paxton was indicted twice more on July

---

pro tem or their fees or they are wavied. *See Marbut v. State*, 76 S.W.3d 742, 749 (Tex.App.-Waco 2002, pet. ref'd), 749; see also *Stephens v. State*, 978 S.W.2d 728, 730 (Tex.App.-Austin 1998, pet. ref'd); and *Landers v. State. See* 402 S.W.3d 252 (Tex. Crim. App. 2013).

[2]Ex. A. This first order is not a part of the clerk's record and was not produced by Judge Becker despite a request for all documents relevant to the appointment under the Texas Public Information / Open Records Act. *See* Ex. B. Several other local judges produced it to Paxton's counsel pursuant to a similar request.

[3]Ex. C. Published at http://lawflog.com/wp-content/uploads/2015/08/2015.05.20-Second-order-re-special-prosecutors.pdf (last viewed December 23, 2015)

28, 2015, both of which were then dismissed and re-indicted on August 18, 2015.

On September 18, 2015,, a third attorney pro tem, another non-governmental attorney, Nicole Deborde, was appointed, though she took the oath of office on August 27, 2015.

III. ARGUMENT AND AUTHORITIES

These three private lawyers were vested with prosecutorial power pursuant to Article 2.07(a) and (c) of the Texas Code of Criminal Procedure ("CCP"). None are "attorneys for the state" in Collin or any other county as defined by Article 2.07(d) or (e) of the CCP. As a result, they "**shall** receive compensation" in the "same amount and manner" as an attorney appointed to represent an indigent person." TEX. CODE CRIM. PRO. ART. 2.07(c) (emphasis added).[4]

Article 26.05 of the CCP governs payment for indigent defense in Texas. *See Id.* at ART. 26.05. The Court of Criminal Appeals has stated, "we can only construe article 2.07(c) as incorporating the provisions of Article 26.05 that govern the amount and manner of compensation; those provisions speak to the kinds of expenses and services of an appointed attorney, the methods of calculating the attorney's fee, the form of schedules and reporting, the method of approval, and the

[4]Collin County has in the past appointed attorneys pro tem from neighboring counties to prosecute cases on its behalf and also had the attorneys of the Texas State Securities Board prosecute violations of the Texas Securities Act in Collin County a half-dozen times since 2010, but Judge Becker chose to do neither with respect to Paxton.

source of funding." *Busby v. State,* 984 S.W.2d 627, 630 (Tex. Crim. App. 1998)(where reimbursement of attorney pro tem fees improperly assessed as court costs). Under Article 26.05(b) "[a]ll payments made under this article shall be paid in accordance with a schedule of fees adopted by formal action of the judges of the ... district courts trying cases in each county." TEX. CODE CRIM. PRO. ART. 26.05(b). Collin County has adopted and published a fee schedule in accordance with this law and the "$300.00 per hour" reportedly agreed upon by Judge Becker far exceeds the amounts in that fee schedule, which is "without exception."

A. Indigent Defense Plan Fee Schedule is "Without Exception"

Collin County has a published "District Court Plan" ("The Plan") for felony indigent defense adopted on October 22, 2013, amended effective October 28, 2015.[5] Section 4.01 of The Plan states:

> A. The District Judges adopt, pursuant to Article 26.05 Tex. Code of Crim. Proc., a fee schedule for appointed attorneys, attached hereto as "Fee Schedule for Appointed Attorneys."
>
> B. Payment can vary from the fee schedule in unusual circumstances or where the fee would be manifestly inappropriate because of circumstances beyond the control of the appointed counsel.
>
> - Ex. D, pg. 11.

[5] *See* Ex. D, at http://www.collincountytx.gov/indigent_defense/Documents/Felony_TFDA.pdf, last viewed December 23, 2015.

Under The Plan, the rate of compensation in a first degree felony case is $1,000.00 for a plea, $1,000.00 for pre-trial preparation, $500.00 per half day of trial, and a maximum upwards adjustment of $1,000.00. Ex. D, pg. 12-13. According to the face of the fixed fee schedule, the fee schedule is "without exception." *Id.* Notwithstanding Rule 4.01B of The Plan, the District Court Judges of Collin County regard the amounts in the schedule as inflexible and that they cannot be increased according to emails produced under the Open Records Act ("TPIA"). In that chain of emails, Judge Ray Wheeless of the 366th District Court stated as recently as September 8, 2015;

> In May of this year, the District Judges had an occasion to discuss whether the fixed fee rates in indigent defense cases were to be followed or if there was some judicial discretion allowed. The enclosed email from Judge Oldner makes it clear that the prior "discretionary" language was amended by stating that **the fixed fee schedule was to be followed without exception**. I believe that the later adopted amendment controls.
>
> - Ex. E, pg. 1 (emphasis added).

This email appears to have been a rebuke of Judge Becker. Earlier that same day, Judge Wheeless wrote;

> It is clear that all of us, and specifically Judge Oldner, agreed as recently as May 25, 2015, that the fixed fee schedule was to be followed. **The language now being cited by Judge Becker at our recent meeting was previously rejected** in favor of the later amendment cited below.
>
> - *Id.*

That inflexibility is consistent with Art. 26.05(b)'s requirement that "all payments" be paid under the schedule of fees. Even when a judge's fee award is appealed and a fee is approved by the presiding judge of a judicial administrative region, it must still be "in accordance with the fee schedule for that county." *See* Art. 26.05(c).

There is simply no statutory basis to deviate from the fixed fee schedule adopted by the judges and which they have strictly construed against local indigent defenders. Certainly, were Paxton indigent, his counsel would be held to these strict compensation limits in the *published* plan.

B. Only $3,000 is Allowed for Pre-Trial in this Case After Final Disposition

Paxton is charged with two first degree felonies and one third degree felony. The two first degree felonies reportedly arise from the same alleged transaction or episode whereas the latter from entirely different relationship and set of events. There has been no trial in these cases. Accordingly, under the schedule of fees adopted by the judges and Articles 2.07(c) and 26.05(b) of the CCP, the Attorneys Pro Tem should be paid *at most* $1,000 each for pre-trial per case under The Plan **after the final disposition** of the cases.

Rule 4.02 of the "Collin District Court Plan" states that applications for payment "**shall**" be submitted on the day of a non-trial disposition or within seven days of trial. *No* provision is made in the rules for payment of appointed attorney fees to the Attorneys prior to final disposition of a criminal case in Collin County

under the existing plan. Any box for partial payments on the "Appointed Counsel Request for Compensation" form revised in 2007 is irrelevant as the form also applies to direct payments for non-attorney services (investigators, experts, etc.) which are not governed by Rule 4.02. Besides, the form cannot trump the dictates of the law.

Paxton has no objection to any direct interim payments to non-attorney providers just as he has no objection to any payments made under the plan to the Attorneys Pro Tem - $1,000 to each attorney in each case for *all* pre-trial matters *after* the final disposition of the case. However, that is not what Paxton believes is being sought at this time by the Attorneys Pro Tem who requested his position be stated in writing. Paxton believes the Attorneys Pro Tem seek immediate payment of an amount grossly in excess of the published fixed fee schedule for indigent defense pursuant to an agreement they reached with Judge Becker before they were even appointed.

C. Judge Becker Agreed to an Excessive Rate *Before* the Case Even Began and Planned to Keep it a Secret

Rather than follow the published fee schedule for indigent defense in Collin County as required by CCP articles 2.07 and 25.06, Judge Becker reportedly secured the services of Mr. Wice and Schaffer upon a $300.00 per hour rate that

was to be kept *secret* and *grossly exceeds the published rates* of the Collin County indigent defense plan, even for those facing the death penalty. Ex. F.

Chris Hill, Commissioner of Collin County Precinct 3, spoke with Judge Becker about the fee amount on August 18, and 19, 2015. Commissioner Hill's notes on the conversation were produced in response to a TPIA request. *See* Ex. F. In their first conversation on August 18, 2015, Becker told Commissioner Hill, in part, that:

- I never intended to make the amount (per hour) public
- I wasn't planning to share the rate but I'll tell you since you asked
- I will figure it out and send it to you
- You understand there are just some people who don't need to know (the rate)
- Some people might be inclined to use the information in the wrong way

  - Ex. F, pg. 2[6]

The next day, Judge Becker told Commissioner Hill that he had agreed to $300.00 per hour with the Attorneys Pro Tem.

It is reasonable to infer that this unlawful compensation amount was offered by Judge Becker to Mr. Wice and Schaffer *prior* to Judge Becker signing their

[6]At various times, budgets of $2,000,000 and $285,000 for this prosecution have been reported by various media outlets. Collin County Commissioner's Court Minutes for August 24, 2015, reflect these amounts. The adopted budget for Fiscal Year 2016, reportedly includes a line item for $100,000.00 for this prosecution.

appointments.[7] This **secret** rate to be paid the Attorneys Pro Tem violates both the spirit and the letter of the law as it is contrary to the **published** indigent compensation plan approved, adopted, and published by the judges of Collin County, and thereby Articles 2.07(c), Art. 26.05 of the Texas Code of Criminal Procedure.

The provision of Local Rule 4.01B (which may violate Art. 26.05(b) on its face) cannot be applied to this case to pay an excessive rate. As the face of The Plan and the judge's emails demonstrate – the fixed fee schedule is "without exception." Furthermore, Judge Becker cannot have known at the time he agreed to $300 per hour what the *actual* circumstances of the prosecution would entail. Any discretion Judge Becker might have had to adjust the amount in excess of the $1,000 per case in The Plan was before the appointments and cannot serve as a basis for paying any voucher at the rate agreed upon. Any amount in excess of The Plan is also inappropriate when compared to the amount paid to defend persons facing the death penalty and the amount earned by the professionals with the legal duty to investigate and prosecute violations of the Texas Securities Act.

D. $300 Per Hour is Twice that paid for Death Penalty Defense and Thrice that paid to Professional Securities Fraud Prosecutors

[7]Defendant anticipates these matters will be substantiated by testimonial and other evidence including documents and other items responsive to pending TPIA requests for this information which Judge Becker and others have denied disclosure of and which denials are being appealed.

Naturally, the private lawyers are entitled to command their market rates for *private* cases. However, with their appointments, they have stepped into the shoes of public servants and must be accountable to the *public* trust. The $300.00 per hour rate is not only excessive under articles 2.07 and 25.06 of the CCP, but also when compared to any relevant amount. Under The Plan, appointed counsel in death-penalty cases in Collin County are paid half that amount, $150.00 per hour. Counsel in non-death capitals murder cases are paid a third of that amount, $100.00 per hour. All other serious first degree felonies, including murder, aggravated sexual assault of a child, aggravated robbery, and even first-degree theft cases are limited to the $1,000.00 per case amount.

As further comparison, The Honorable Greg Willis, Collin County Criminal District Attorney, is paid an annual salary of $187,684, which, works out to approximately $93.85 per hour.[8] The executives and attorneys at the Texas State Securities Board, the experts in securities prosecution who have prosecuted cases in Collin County recently, make even less than Mr. Willis, with Director Ronak Patel receiving $142,792 per year ($71.40 per hour) and the General Counsel,

[8]Based upon a forty hour work week and fifty work weeks per year. Salary information published by Collin County Auditor at http://www.collincountytx.gov/county_auditor/FinancialTransparency/OfficialSalaryLib/Fiscal%20Year%202016/Elected%20-%20Appointed%20-%20Department%20Head%20Salaries%20FY%202016.pdf (last viewed December 22, 2015).

$127,504 ($63.75 per hour).[9] Yet, before a single pleading was filed in this case Judge Backer ignored previous appointments of prosecutors from other counties or the Texas State Securities Board and, instead, agreed to pay two career defense attorneys more than four times per hour what *full time professionals*, with the duty and expertise to prosecute violations of the Texas Securities Act, are paid.

The Attorneys Pro Tem should not be paid an amount that exceeds what is paid to local defense attorneys representing indigents in Collin County under the published fee schedule.

CONCLUSION

PAXTON objects to any payment in excess of $1,000.00 per case to each Attorney Pro Tem for all pre-trial work performed. Paxton has no objection if payment is made in accordance with the Statutes.

[9] *See* http://salaries.texastribune.org/state-of-texas/departments/securities-board/ (last viewed December 22, 2015).

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2015 a true and correct copy of the above and foregoing was served on all counsel of record via electronic case filing.

/s/ Philip H. Hilder
Philip H. Hilder

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